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THE FRENCH SYSTEM OF CRIMINAL PROCEDURE.

In France, a criminal trial is nothing else than the last stage of an elaborate public inquiry, carried on by an organized public department, of which the tribunal which ultimately tries the prisoner is in some degree the head. The general principle upon which the system rests is embodied in the first article of the Code d' Instruction Criminelle. Its terms are, "L' action pour l' application des peines n' appartient qu' aux fonctionnaires auxquels elle est confiée par la loi." The nature of the machinery provided for the purpose of discovering and punishing crimes is as follows: There are in France twenty-seven Cours Impériales. At each of these there is a Procureur-Général, who has various deputies and substitutes. In every arrondissement there is a Juge d' Instruction (chosen for three years, from the Judges of the Civil Tribunal), and in every Tribunal de première instance there is a Procureur de l' Empereur. The comissaries of police, the agents of police, the gendarmerie, and other inferior officers, are under the orders of these authorities, who form, as the French phrase is, a "hierarchy," extending from the gendarmes to the Procureur-Général. The Procureur-Général himself is a sort of judge advocate, being so far a member of the Cour Impériale that he sits on the bench during trials, and interferes *ex officio* on many occasions in the course of them. The functions of these various officers (who constantly correspond with each other, and stand in the closest official relation) are almost entirely inquisitorial. They receive and collect evidence of every kind

in reference to any crime which has been committed, and constantly interrogate the accused upon every point of the charge, and confront him from time to time with the witnesses. They have it in their power to place the accused in solitary confinement (au secret), and constantly exercise it, the object being to prevent him from communicating with his friends, and from forming any systematic defence. They keep him in ignorance of the depositions which may have been made for and against him, and then question him on the facts to which they refer. By comparing together these various sources of information, they gradually elaborate a theory on the subject, which, in complicated cases, has often innumerable ramifications, and is supported not only by arguments of a most refined character, but also by considerations drawn from the manner in which the witnesses give their evidence, the degree of frankness shown by the accused in his answers, and many other circumstances. This is called "instructing the process;" and the final results of the "instruction" are embodied in an acte d'accusation, — a document which not only recapitulates all the grounds from which the Ministère Public infers the guilt of the accused, but also frequently states and refutes by anticipation the arguments for the defence. An intimate connection exists between the officers who "instruct" the process, and the Cour Impériale, which finally tries the case. A committee of that body, consisting of three judges, form a sort of grand jury, called the Chambre des Mises en Accusation. This body, after hearing the Procureur-Général, determine whether or not there is ground enough to put the accused person on his trial, and they may if they please cause additional evidence to be collected, on the same terms as the inferior magistrates. The Cours Impériales have also the right of instituting proceedings in the first instance. When the question of the mise en accusation is under discussion, the person accused, or the partie civile (*i.e.*, any one who seeks to recover damages for injury done him by the crime), may lay mémoires before the judges, who must hear them read before they decide. If, to use our own phrase, the chamber finds a true bill, the affair is sent before the Cour d'Assises of the department, a sort of circuit court, in which one of the judges of the Cour Impériale sits as President; or if the department be that in which the Cour Impériale itself is situated, the case is tried before a committee of that body, sitting as a Cour d'Assises.

After the opening of the assises, the prisoner is interrogated in private by the President. The witnesses are cited by the Procureur-Général or the prisoner, and the President has a discretionary power of calling in any additional witnesses whom he thinks it desirable to hear. The trial begins by the reading of the acte d' accusation; the Procureur-Général then presses the case against the prisoner, speaking generally with far more warmth, and expressing a much more decided opinion than would be thought becoming in this country. The President then interrogates first the accused, and then the witnesses, the Procureur-Général deciding on the order in which they are to be called. There are no rules of evidence; and in the first instance the witnesses tell their own story in their own words, and without any interruption whatever, the effect of which often is that they make long speeches not very material to the question. After the deposition is completed, the President cross-examines; and after his cross-examination is over, the counsel for the prisoner may put any further questions if he pleases, but he can only do so through the President. This privilege is hardly ever exercised, and this in itself forms a broad distinction between a French and an English trial; for in the latter the cross-examination of witnesses is one of the most important and most characteristic parts of the proceedings. After the examination of the witnesses, the advocate for the partie civile, the Procureur-Général, and finally the advocate for the prisoner, address the jury; lastly, the President sums up. But this part of the proceedings has less importance in France than in England, and the resumé is as often as not confined almost entirely to a recapitulation of the arguments of the counsel.

It is obvious from this short sketch of French procedure, that hardly any discretion or independent action is allowed to the prisoner from the very first. He cannot manage his defence in his own way, but on the contrary the Ministère Public manages it for him, counterchecking it as the proceedings go on, and too often concluding in favor of his guilt from any confusion or falsehood on the part of witnesses favorable to him. The issue of the trial is virtually almost decided before it begins, because it is only the last act of a continuous process; and thus it is hardly an exaggeration to say that the jury in a French court is an anomalous excresence. As its introduction into France is no older than the Revolution, and as the greater part of the Code Napoleon is a mere

recast of laws which existed long before that time, it may very probably be the case that the whole scheme of French criminal procedure may have been adapted to the ancient system, in which the object was to convince the minds of the court; and it must always be remembered that the Tribunaux Correctionnels, which can imprison for ten years, and deprive men of civil rights, and before which nearly nineteen-twentieths of the French criminal trials take place, try causes without juries.

In order to understand the difference between the English and French systems of procedure, and the character of the French system, we must suppose the attorney for the prosecution, the committing magistrate, and the counsel for the crown, to stand to each other in the relation of official superiors and inferiors, and we must further suppose the counsel for the crown to be a sort of assessor to the judges of assize. To complete the system we must substitute for the fifteen judges a much more numerous body, scattered over the country in threes and fours, each group having under their official authority all the committing magistrates and all the prosecuting counsel and attorneys within a wide district, and discharging themselves the functions of grand jurymen. We must also suppose the procedure to be secret until the day of trial, and the accused to be liable to close confinement, varied only by as many interrogatories and private confrontations with witnesses as the judge "instructing the process" might think advisable. If a prosecution is to be considered as a public investigation, it is obvious that those who are to conduct it must stand in some relation of this sort to each other. A system in which the prosecuting attorney who collects the evidence; the committing magistrate, who weighs it; the grand jury, who keep a sort of nominal check upon it; the counsel for the crown, who exercises an absolute discretion, not only as to the order in which the witnesses are produced, but as to their being called or not, and as to the questions which shall be put to them; and finally, the judge and jury, who decide the case, are all absolutely independent of each other, is fitted only for the purpose of ascertaining, by a series of successive tests, the weight of the prosecutor's assertion that the prisoner is guilty. The result of the French system, on the contrary, is the gradual elaboration of a theory on the subject of the crime, supported by a mass of evidence which has been collected and arranged by a set of public function-

aries intimately connected together, and bound by all the ties of official esprit de corps and personal vanity, to maintain the accuracy of the conclusions at which they have arrived.

It is difficult by mere generalities to convey an adequate notion of the differences of the English and French systems of procedure. In order to shew how the French system works, we will proceed to examine with some minuteness a case which excited great interest in France some years back—the trial of the monk Leotade, for rape and murder.

The case, told as an English or an American lawyer would tell it, is as follows:—On the 16th of April, 1847, at half-past six o'clock in the morning, the body of a girl of fourteen, called Cecile Combettes, was found in the corner of a cemetery at Toulouse, close to the wall of the garden of a monastery, and rather further from another wall which separated the cemetery from a street called the Rue Riquet. The body rested on its knees, toes, and elbows, and the left cheek and temple were on the ground and were covered with mud. The ground was wet, but there were no footsteps upon it. A patch of moss, with the earth to which it adhered, had been detached from the convent wall, and some fragments of it were found in the hair of the body. This moss appeared to have been loosened by the rubbing of certain branches of cypress which overhung the wall of the Rue Riquet, and reached that of the monastery. On the top of the monastery wall were several broken plants, and especially a geranium, which had lost all its petals. A petal of geranium and some sprigs of cypress were found in the hair of the body. On the garden side of the monastery wall there were also one or two plants which had been disturbed. There was found in the garden itself a piece of cord, and in the hair of the body a thread of tow. There were also some footsteps in the garden, and marks of the feet of a ladder. Of several ladders found in the monastery, one corresponded to the marks in width, but not in the form of the extremity—but there had been rain in the night, which would alter the shape of the marks. On the other hand, there was a lamp in the Rue Riquet itself, which threw its light on the wall of the cemetery, and a sentinel was stationed further up the street. From these circumstances it was suggested that the body must have been, in some manner or other, dropped over the monastery wall into the place where it was found.

The last time when the deceased was seen alive was on the

morning of the 15th of April, soon after nine, when she went with her master, a bookbinder named Conte, to the convent. He went up-stairs to the director on business, leaving her with orders to wait for him to bring back some empty baskets. He also gave her his umbrella to hold. When he came back she was gone, and the umbrella was leaning against the wall. From the testimony of several witnesses, it was proved that she had left the passage where her master had stationed her within a few minutes after his departure, and by about a quarter-past nine. Suspicion fell in the first instance on Conte, who was arrested. When under arrest, he said that he had seen Leotade and another monk, called Jubrien, talking together in the passage when he entered it; and to a certain extent he was corroborated as to Jubrien by Jubrien's own statement. Leotade slept, on the night after the murder, in a room from which he could have reached the garden by the help of a key found in his possession; and on the day after the murder, on hearing that a girl in Conte's service had been found dead in the cemetery, but before the cause or the circumstances of her death were known, he used expressions which certainly might be construed into an imputation on Conte. The deceased, on a medical examination, appeared to have died of a blow on the head which broke the skull, and had obviously been subjected before her death to great violence of another kind. From the state of the contents of the stomach, it was proved that her death must have taken place within a short time after her last meal, and consequently not long after she was last seen alive. A feather, some grains of corn, and stalks of hay were found on the body, in a position which, to a certain degree, indicated that they had been brought from the scene of the crime; and in the monastery garden, near the corner formed by the two walls, were several barns, in one of which was a heap of corn, and in another some hay, but there was no evidence that they bore marks of disturbance. To these buildings Leotade's occupations in the convent gave him access, and in one of them he kept rabbits and pigeons.

This was the whole case against Leotade, as it would have stood according to our rules of evidence. No one would maintain that, upon that evidence alone, it would have been desirable to convict him. Since, however, he was convicted, it will furnish some light on the expediency of our rules of evidence, to see what in this case was the character of the

testimony which they would have excluded, and which did, in fact, produce a conviction, It consists of two great divisions —the prisoner's own answers when interrogated, and the detection, or supposed detection, of efforts made by the other monks to suppress evidence and to suborn false witnesses. The arrests of Conte, of Leotade, and of Jubrien (who was at one time suspected), took place in April, 1847, and the trial began on the 7th and lasted till the 26th of February, 1848. It was then broken off on account of the Revolution, and was begun again on the 16th of March and ended on the 4th of April, the seventeenth day of the inquiry. During great part of the time that the prisoners were in confinement, they were constantly interrogated. Conte, whose imprisonment was comparatively short, had to repeat no less than thirty times the statement he made as to having seen Leotade and Jubrien together. Leotade himself was examined and re-examined continually about the way in which he had passed his time on the day in question. He was questioned, for example, on the 18th, 23d, and the 26th of April, on the 3d and the 6th of May, and on the 17th of December; and on his trial he was taxed with all the inconsistencies which could be discovered between his statements on these different occasions, and with any discrepancies which existed between any of them and his statement in court. By these means a good deal of confusion was detected, or said to be detected, on several points, the most important of which were, first, that in his earlier statements, he did not mention his having passed part of the morning on which the crime was committed in writing his compte de conscience, whereas at his trial, and on one preceding occasion, he did; and secondly, that he failed to give a satisfactory account of the shirt which he had worn on the day in question. All the convent linen was used in common, each monk having a clean shirt supplied to him from the common stock every Saturday. Certain marks were found on one of the dirty shirts which had been worn during the week in question, which seemed to indicate that it had been worn by the murderer, though the indications were far from being conclusive. There were about one hundred and eighty monks, some of whom—and amongst them Leotade—belonged to the "Pensionnat," and others to the "Noviciat." The shirts of the two classes were differently marked, though they were occasionally mixed. The shirt in question belonged to the "Noviciat," so that it was unlikely, though possible,

that Leotade might have worn it. There was not a shadow of evidence that he actually had worn it, except the fact that he maintained that he had not changed his shirt on the Saturday after the murder, and that the reason which he gave for not having done so was apparently false. It was also stated, in the acte d'accusation, that all the rest of the monks had accounted for their shirts, and that none of them owned to having worn the shirt in question; but no independent evidence of this vital assertion was given to the jury.

The second division of the evidence is infinitely more voluminous than the first, and consists almost entirely of what, under the English system of procedure, would have been the cross-examination of the prisoner's witnesses. The principal objects of the defence, as we should have them arranged, were, in the first place, to prove that the deceased left the convent alive; and secondly, to establish an alibi on behalf of the prisoner. To this the prosecution replied by charging all the witnesses on both points with systematic perjury and subornation of perjury. It would be wearisome to enter into a minute examination of the merits of these conflicting statements. It is sufficient to say that the general nature of the argument, founded on this part of the evidence, was, that Leotade must be guilty, inasmuch as much false testimony was given on his behalf; and that in order to make out that the testimony was false, such a mass of collateral matter was gone into, as to what various people said to each other, as to the letters which they wrote, and as to the expressions which they had dropped in casual conversation, that it is hardly possible to understand or to follow the discussion. The most trifling gossip was not excluded. One man, for example, was permitted to inform the court that he had told somebody else, on hearing of the news, that he felt sure that if the girl had entered the convent she would never leave it alive; and the President told him, with great gravity, that if the fact was so, his remark was "une appréciation quelque peu prophétique." Still more singular is the observation of the acte d'accusation itself, that the place in which the crime was conjectured to have been committed "semble predestiné pour une crime." But the strangest of all these supplementary articles of evidence was supplied by the Judge d'Instruction himself, who said that, on one occasion during the course of his examination of Leotade, he thought from his manner that he was about to confess, and that though he had certainly

explicitly denied the crime, still "s' il faut dire toute ma pensée j'ai cru et je crois encore que Leotade a été au moment de me faire un aveu." Moreover, continued the magistrate, "en interrogeant Leotade pour la première fois son trouble était extrême et comme à la fin on lui disait retirez-vous, il manifesta une joie *qui pour moi trahit la possibilité de sa culpabilité*, et sans l'intervention de M. le Procureur-Général je le mettais immediatement en arrestation." Such is the kind of evidence which, in a case of this importance, is admitted under the French system. That it is admitted at all, is a consequence of the whole character of the proceedings, which far more resemble the proceedings before English Commissioners of Inquiry than the proceedings before an English Court of Criminal Law. The members of the Cour Imperiale, including the Procureur-Général, the Juge d'Instruction, and the Procureurs du Roi, jointly and severally devote all their energies to the collection of every sort of information or suggestion in any way bearing on the case in hand. The mass of matter thus collected is enough to bewilder any jury, and must virtually make them almost entirely dependent on the direction of the Court.

The manner in which the evidence is laid before the jury is not less illustrative of the principle of the whole trial than the character of the evidence itself. As has been already observed, the "Instruction" does not leave, or even permit, the prisoner to frame his own defence in his own way, but takes that business out of his hands, and draws unfavorable conclusions from the shortcomings of his witnesses. If an alibi is relied upon in England, the prisoner's attorney sees the witnesses, prepares the proofs, and instructs his counsel of their character, and it is at the trial that they are for the first time judicially considered. In France, the prisoner is interrogated as to where he went, what he did, and whom he saw, from the very first; and any person whom he mentions is immediately called before the Juge d'Instruction, and examined upon the subject, apart from the prisoner. That a prosecutor, public or private, wishes to convict the prisoner upon the same principle which makes a sportsman desirous to bag his game, is a matter of perfect notoriety; the consequence is, that this system, which, at first sight, appears so humane, in reality has a constant tendency to resolve itself into duels between the authorities, the prisoner, and his witnesses. In Leotade's trial more than sixty witnesses were called, and the

trial occupied nearly three weeks, to say nothing of the *instruction*, which was spread over seven or eight months. More than half of these witnesses were called literally for the sake of contradicting each other. Thus, for example, an old woman, called Sabatier, said that she had seen the murdered girl under circumstances which would show that she had left the monastery alive. No less than ten witnesses were called to refute her, yet her evidence upon the subject was given, and its falsehood proved, months before the trial; and the whole matter might, therefore, have been safely laid out of account. In an English court she would, of course, have been called, if at all, for the prisoner; and if his advisers had seen reason to distrust her — as they probably would, for she was a mere foolish gossip — she would not have been called at all. Another illustration of the same thing occurred in respect of the evidence of the different monks. The acte d'accusation is divided into two parts, of which the first is occupied by arguments to show that the crime was committed in the monastery, and the second by arguments to show that it was committed by Leotade. According to our principles, the first of these questions would be utterly immaterial except in so far as it bore upon the second; but the French court so managed matters as to make the question of Leotade's guilt almost subordinate to the question of the guilt of some one member of the convent. Four-fifths of the evidence given at the trial consists of refutations by the prosecution of rumors circulated, or supposed to have been circulated, on behalf of the monks, and of exposures of the falsehoods told upon various isolated parts of the case by other monks not shown to have been connected with the prisoner. A single illustration will show the endless confusion which such a mode of proceeding is calculated to produce. Evidence, says the acte d'accusation, which would give a different turn to the procedure, had been announced by the newspapers. It was said that the lad Vidal (who was in the parloir when the girl entered the passage), had seen the girl leave the monastery. The Juge d'Instruction "prepared to receive this evidence, and, at the same time, took measures to check it" (de la contrôler). After much inquiry he found out that Vidal was in communication with the principal members of the monastery; and the lad himself gave his evidence with many qualifications, and much hesitation. In consequence of these inquiries, the acte

d'accusation expressly declares that "la cour n'a-t-elle pas hésité à déclarer que la déposition de Vidal ne meritait pas la confiance de la justice." Notwithstanding this, he was one of the principal witnesses against the prisoner, for he stated that he had been present at a sort of meeting in which various influential members of the monastery took part, and at which they concocted evidence tending to prove that the girl had left their establishment. Upon this subject many witnesses were examined, and a great deal of contradictory assertion and very violent language passed between all parties. It does not seem to have occurred to any one that the whole debate was quite beside the question. That Vidal could not prove that the girl had gone out alive, was admitted by himself in his very answer; and if that point failed, it was perfectly immaterial to show that any amount of perjury and subornation of perjury had been employed to establish it. That such a state of things should exist would, no doubt, be very discreditable to a religious establishment, but it is absurd to say that it would tend to prove Leotade's guilt. If he personally had suborned false witnesses it would have been very different, but as he was in close custody, that was out of the question; and it was surely most unjust to make him responsible for what, at most, was the criminal conduct of most unwise partizans.

Perhaps the most curious feature in French procedure is the narrowness of the sphere within which the functions of the jury are confined. They are frequently obliged to take for granted, on the authority of the court, the most important part of the evidence. In the case of Leotade, the strongest facts against him were the imperfect and conflicting accounts which he gave of the employment of his time on the day in question. The fact that this was so, was proved solely by the procès verbaux taken at the different interrogations. Although Leotade urged repeatedly that he had been so tormented by questions, so intimidated and browbeaten, that he was quite confused, and did not know what he said, no evidence appears to have been produced to disprove his assertion. It seems to have been assumed that official acts were not to be questioned, and that official assertions must be true. It is a slight but significant illustration of this temper, that when a brigadier of gendarmerie and a monk differed, the President told the latter that the former had a right to the confidence of justice both as a witness and

a "functionary." Nothing is more common than to hear English judges warn the jury to be very careful about believing too easily the evidence of policemen, or skilled witnesses. An even stronger illustration is to be found in the fact, that the jury who tried Leotade were each supplied with a copy of the acte d'accusation,—a document which closely resembles, in its style, length, and objects, the opening speech of an English prosecuting counsel. As the evidence swelled to a size altogether unmanageable, this was almost equivalent to prejudging the case.

THE PRIVILEGE OF A WITNESS OF NOT ANSWERING A QUESTION, AS TENDING TO CRIMINATE HIM.

THE rule, that a witness shall not be compelled to answer questions tending to criminate him, is a well-known and established rule of law. The policy of the principle which it embodies has, indeed, been questioned, but with little reason, although it must be admitted that it has sometimes been pushed too far in practice. Our object at present is not to discuss the merits of the rule, but to direct attention to an important practical question affecting its application which has been recently raised in England, and, after having during several years caused no little difference of opinion on the bench and in the profession, appears settled by a recent decision in the Court of Queen's Bench.

The point is this:—A witness refuses to answer a question on the ground that the answer might tend to criminate him. If the judge sees that the answer might have that effect, he ought, of course, to allow the objection. But suppose he does not see that—an event likely enough to occur, for the witness must necessarily know much more about the matter than the judge—is he conclusively bound by the statement of the witness that it would have that effect, so as to be compelled to allow the privilege, and excuse the witness from answering?

This question was started, we believe, for the first time, in

Regina v. *Garbett*,[1] on a case reserved from the Old Bailey; but it became unnecessary to decide it, as the case went off on another point. A few years after, however, the case of *Fisher* v. *Ronalds*[2] came before the Court of Common Pleas. In that case a new trial was moved for on the ground that the judge at nisi prius had improperly refused to compel a witness to answer a certain question; and the court unanimously held, in a decision which we think no person would question, that he had done right, as, under the circumstances, the witness was privileged. But two of the judges went far beyond the actual point before the court. MAULE J. said, "It is the witness who is to exercise his discretion, and not the judge. The witness might be asked, 'Were you in London on such a day?' and though apparently a very simple question, he might have good reason to object to answer it, knowing that if he admitted that he was in London on that day, his admission might complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless if the witness were required to point out how his answer would tend to criminate him." And JERVIS C. J. uses language somewhat similar. The first idea that suggests itself to the mind on reading this case is, that no judge could have used language so sweeping and dangerous, and consequently that there must be some error in the report. But the other reports of the case[3] completely agree with the above, so that this hypothesis must be abandoned.

The startling proposition that every witness, the most mendacious or the most profligate, may effectually shelter himself from giving any evidence if he will only swear that the answer to every question put might criminate him, soon attracted attention. In *Osborn* v. *The London Dock Company*,[4] PARKE B., on the above dictum being cited, denied the doctrine in the most positive terms, referring to various authorities as inconsistent with it. ALDERSON B., however, spoke with considerable diffidence upon it; and in that case also it became unnecessary to decide the point. In a subsequent case, however, *Sidebottom* v. *Adkins*,[5] in 1857, the

[1] 1 Den. C. C. 236 (1847).
[2] 12 C. B. 762.
[3] 22 L. J. C. P. 62; 17 Jur. part 1, p. 393.
[4] 10 Exch. 701; 1 Jur. N. S. part 1, p. 93.
[5] 3 Jur. N. S. part 1. p. 631.

question arose whether, where interrogatories are administered to a defendant in chancery, his statement on oath, that the answers to the interrogatories would criminate him, is conclusive on the judge, so as to compel him to disallow them. *Fisher* v. *Ronalds* and other cases were cited; but Sir J. STUART V. C. ruled in the negative, saying that some surprise had been excited in his mind by the opinions expressed by JERVIS C. J., and MAULE J., in that case. On the other hand, in 1858, the case of *Adams* v. *Lloyd*,[1] came before the Court of Exchequer, in which POLLOCK C. B. expressed himself as follows:—"Certainly I have always thought that the law on that subject was correctly stated by MAULE J. in the case of *Fisher* v. *Ronalds*. . . . . The only exception I know is this—where the judge is perfectly certain that the witness is trifling with the authority of the court, and availing himself of the rule of law to keep back the truth, having in reality no ground whatever for claiming the privilege, then the judge is right in insisting on his answering the question." And, lastly, in the case of *Ex parte Fernandez*,[2] WILLES J. expresses himself in a way which shows that at least he entertained doubts respecting the correctness of the doctrine in *Fisher* v. *Ronalds*.

In this state of the authorities arose the case of *Regina* v. *Boyes*,[3] decided in Trinity Term, 1861, which seems conclusive on the question. That was an information for bribery at an election for a member of Parliament, and one of the witnesses who was called on the part of the prosecution refused to give evidence as to the alleged bribery, sheltering himself under the rule of law before us. A pardon for the supposed bribery was then given him, but he still refused to answer, until the judge decided that he was bound to do so. A rule for a new trial having been obtained, on the ground, among others, that the judge had done wrong in this respect, it was argued in support of it, that although by the pardon the witness was protected from prosecution on the part of the crown, he was still liable to impeachment by the House of Commons for bribery, in which event, according to the express provision of the Act of Settlement, 12 & 13 Will. 3, c. 2, s. 3, the pardon of the crown would not avail him. *Fisher* v. *Ronalds* and some other authorities were referred to during the

[1] 3 H. & N. 351; 4 Jur. N. S. part 1, p. 590.
[2] 10 C. B. N. S. 39, 40; 7 Jur. N. S. part 1, p. 579.
[3] 1 B. & S. 311; 7 Jur. N. S. part 1, p. 1158.

argument, but it is worthy observation that *Sidebottom* v. *Adkins*, *Adams* v. *Lloyd*, and *In re Fernandez* were not. Perhaps the last had not then been been reported, but the first is expressly cited, and the second obviously referred to in the judgment. The court consisting of COCKBURN C. J., CROMPTON, HILL, and BLACKBURN JJ. took time to consider; and COCKBURN C. J. afterwards delivered their unanimous judgment as follows:—

"Upon a review of the authorities we are clearly of opinion that the view of the law propounded by Lord WENSLEYDALE in *Osborn* v. *The London Dock Company*, and acted upon by SIR J. STUART V. C. in *Sidebottom* v. *Adkins*, is the correct one; and that, to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. We, indeed, quite agree that, if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question, there being no doubt, as observed by ALDERSON B. in *Osborn* v. *The London Dock Company*, that a question, which might appear at first sight a very innocent one, might, by affording a link in a chain of evidence, become the means of bringing home an offence to the party answering. Subject to this reservation, a judge is, in our opinion, bound to insist on a witness answering, unless he is satisfied that the answer will tend to place the witness in peril.

"Further than this, we are of opinion that the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. We think that a merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice. The object of the law is to afford to a party, called upon to give evidence in a proceeding inter alios, protection against being brought, by means of his own evidence, within the penalties of the law. But it would be to convert a salutary protection into a means of abuse if it were to be

held that a mere imaginary possibility of danger, however remote and improbable, was sufficient to justify the withholding of evidence essential to the ends of justice. . . . It appears to us that the witness in this case was not, in a rational point of view, in any way in the slightest real danger from the evidence he was called upon to give when protected by the pardon from all ordinary legal proceedings, and that it was therefore the duty of the presiding judge to compel him to answer."

The rule for a new trial was accordingly discharged.

RECENT AMERICAN DECISION.

Supreme Judicial Court of Massachusetts.

COMMONWEALTH, By Bank Commissioners, *v.* BANK OF MUTUAL REDEMPTION.

Suffolk, April 1, 1862.

By the true construction of Gen. Sts. c. 57, § 19, it is the duty of a bank so to conduct its business as to keep on hand an amount of specie equal to fifteen per cent. of its liability for circulation and deposits; and for a neglect or omission substantially to comply with this requisition, a bank is liable to be enjoined, on the application of the bank commissioners, from the further prosecution of its business so far as may be needful to prevent a violation of this provision of the statute.

Under the provisions of Gen. Sts. c. 57, § 63, a bank is not prohibited from borrowing of another bank money payable on demand with interest; but it is prohibited from borrowing money of another bank payable at a future day certain.

A bank cannot buy specie or exchange of another bank and pay therefor in its own bills, with an agreement or understanding that the bills shall not be returned to the bank which issues them, or be put into circulation for a specified time, without violating the provisions of c. 57, § 67, of the Gen. Sts.

After a temporary injunction had been granted, it appearing upon a hearing that the facts set forth in the information, so far as they were contrary to the provisions of the statutes, were done under a mistake or misapprehension of the law, and with no intent to commit a wilful violation of the enactments for the regulation of banks, and it not being alleged that

any other or further similar acts were threatened or intended by the respondents, it was ordered that the injunction should be dissolved upon the payment of costs by the respondents.

This was a petition by the bank commissioners of the Commonwealth, representing that the respondent corporation had exceeded its powers and had failed to comply with certain rules, restrictions and conditions legally imposed upon it by the statutes of the Commonwealth, and praying for an injunction. The particular acts of the bank complained of as violations of the statutes are sufficiently stated in the opinion of the court. The petition was presented to the Chief Justice at chambers, and a temporary injunction issued with an order of notice to the respondents to show cause on a given day, why the injunction should not be made perpetual. A hearing was had, evidence was taken, and a qualified injunction continued; and, at the request of the respondents, all the questions arising in the case were reserved for the consideration of the full court. After an elaborate argument, time was taken for consideration, and the opinion of the court was drawn up by

BIGELOW C. J.—The authority of this court to issue an injunction against a bank on the application of the bank commissioners, and to make such injunction perpetual, as set forth in Gen. Sts. c. 57, § 7, is very broad and comprehensive. It is not limited to cases where the corporation is insolvent, or its further continuance in business will be hazardous to its creditors, but extends to all cases where a bank has exceeded the powers conferred on it, or has failed to comply with any of the rules, restrictions or conditions provided by law for its regulation and management. Nor is the nature of the injunction which the court is empowered to issue in such cases defined or limited by any legislative restriction. This is left to be determined by a sound judicial discretion. It may be absolute, and restrain a corporation from the exercise of all its powers; or it may be partial, prohibiting only such acts as may be hazardous and unlawful. And, upon a hearing of the corporation, the preliminary injunction may be dissolved, modified or made perpetual; or the court may pass such orders and decrees to suspend, restrain or prohibit the further prosecution of the business of the corporation as may be needful to insure the safety of the public or the creditors of the bank against loss, or to compel the corporation to keep within the sphere of its legitimate

functions and duties, and to comply with the various provisions of law enacted for the due management of its business. The object of conferring this very extensive jurisdiction in equity over this class of corporations is obvious. The nature of the important powers and duties with which they are intrusted renders it expedient and necessary that they should be subjected to a careful supervision, and that any irregularity or illegality in their mode of doing business should be promptly checked and prevented.

The allegations in the information before us, on which the bank commissioners now seek to restrain the action of the defendants, are three. The first and most prominent one is, that the officers of the corporation have violated the provision of Gen. Sts. c. 57, § 19, in failing to keep in the bank an amount of specie equal to fifteen per cent. of its liability for circulation and deposits. This allegation is supported by proof that from October 8 to November 16, 1861, on seven different days, the specie in the bank fell below the required amount of fifteen per cent., so that on those days the amount varied from about four per cent. to a little over thirteen per cent.; on one day falling as low as four, and on another day only to about thirteen per cent. of the liability for circulation and deposits. It is contended on the part of the defendants that this proof of the allegations contained in the information shows no infraction of the law; that the statute does not require the corporation to keep on hand a daily or constant reserve of specie of any specified amount; that the requisitions of the statute are fully complied with if it appears that the bank has had a weekly average of specie equivalent to fifteen per cent. of the amount of its liability for circulation and deposits; that it is wholly immaterial to inquire whether on any specific day or days in the course of a week the specie in the bank has fallen below the given standard, if it is shown by the weekly returns which the bank is required to make in pursuance of the provisions contained in Gen. Sts. c. 57, §§ 93, 94, that the average of specie on hand during the previous week has been equal to the percentage required by law. It is on this view of the meaning of the statute that the defendants rest their defence to the first allegation in the information. They do not contend that their omission to have on hand the amount of specie designated in the statute has been the result of accidental circumstances, or has arisen from any unforeseen exigency or unexpected demand on the

resources of the bank. On the contrary, they insist that it is the legitimate result of a mode of conducting their business which does not in any respect contravene the statute regulating the specie reserve of the bank.

From this statement of the question at issue between the parties under the first allegation in the information, it is manifest that the difference between the construction put on the statute by the defendants, and that on which the commissioners rely, is wide and essential. It is a difference which does not touch merely the form of doing business, or the mode in which a specific result is to be attained; but it goes directly to the substantial principle on which the affairs of a bank are to be administered. If the interpretation for which the defendants contend is correct, then it would seem to follow that the banks of this Commonwealth, instead of managing their business in such a way as to render it practicable and certain that they will keep from day to day in their possession and control a specific amount of specie, which shall not fall below a certain definite proportion of their liabilities, and with which they shall be ready at all times to respond to the claims of their creditors, may continue their loans and discounts and enlarge their circulation even to the extreme limits allowed by law, without reference to the amount of specie kept by them, if they are able to make it appear, by borrowing specie for the purpose, or by a temporary purchase of it, or in any other way, that their specie average for the week previously, if the bank is situated in Boston, or if elsewhere, then for the month previously to the making of their weekly or monthly returns, has been equal to the sums which the statute requires them to keep.

What then is the true interpretation of this clause of the statute? If the words are to have their literal signification, and are to be construed by themselves as containing a separate and distinct mandate without reference to the subsequent provision in the same section, there is no room for doubt as to their true intent and meaning. "Every bank shall keep in the bank an amount of specie equal to fifteen per cent. of its liability for circulation and deposits." This is a plain and unequivocal requisition. Unless modified by the clause which follows, it imposes the duty on every bank of having on hand in its banking-house the prescribed amount of specie. The word "keep," in the connection in which it stands with the residue of the sentence, can have no other interpretation than

that given by lexicographers. It means to hold, retain, reserve, or have in possession and control. Indeed, the defendants, in the very able and ingenious argument which has been presented through their counsel, do not deny that such would be the true construction of this provision if it stood by itself, with nothing to modify or restrict its meaning. But they urge, with great force and plausibility, that it is to be construed in connection with the clause which follows it, by which it is provided that when it appears by the weekly or monthly returns which banks are required to make to the secretary of the Commonwealth, that "the weekly or monthly average of specie required thereby to be returned by a bank is less than that amount, such bank shall make no new loans until its specie is restored to such amount." The argument is, that this clause by implication recognizes the right of a bank so to conduct its business as to reduce its specie below the designated percentage, because a weekly or monthly average of specie to a certain amount necessarily presupposes that at some time during the week or month it must have fallen below the given standard. But we cannot think that any just canon of interpretation will warrant us in construing this clause as intended to modify and essentially change the previous clearly expressed requisition of the statute. It is difficult to believe that the legislature would have enacted an explicit and unambiguous mandate by which banks were required to keep a specific amount of specie on hand, if they intended only to require that by their weekly or monthly returns there should appear to be a certain average of specie in each bank. The requisitions are certainly essentially different from each other. If the latter was in contemplation by the framers of the statute, it would have been easy to express it in direct and unmistakable terms, without resorting to an obscure circumlocution, which leaves their meaning in great doubt and uncertainty. But it seems to us that this latter provision was inserted with no design to alter the previously declared rule regulating the specie reserve. It had a different object. It placed a direct prohibition on the officers of the bank, restraining them from making loans and discounts until the deficiency of specie was made up. Its purpose was to provide a means by which to enforce the rule of keeping the specie up to the prescribed limit; not to modify or alter it. Such a provision was the more necessary, because the actual condition of the bank as to specie might not be

known to directors, by whom loans or discounts are usually made, unless it was required of them to ascertain it, by examining the returns of their president or cashier, before extending the liability of the bank by additional loans. But all doubt concerning the meaning of this clause is put at rest by a consideration of the extent of the prohibition restraining discounts. It is not limited to a time when the bank is in such condition that its weekly or monthly average of specie will reach to the requisite amount. This would be the limit, if only an average of specie was required. But it extends until "the amount of specie shall be restored to the proportion of fifteen per centum of its aggregate liability for circulation and deposits." This is the express language of St. 1858, c. 69, § 1, from which the provision in Gen. Sts. c. 57, § 19, is taken. This clearly shows that the normal and legal condition of a bank, which the statute was designed to secure and preserve, and to which it is to be restored in case of deficiency, is, that it shall have on hand a reserve of specie equal to the amount designated in the statute.

Nor are we able to see that any other construction of the language of the statute would carry out the object which the legislature intended to accomplish by these provisions. The title of the original statute is, "An Act to increase the amount of specie in the Commonwealth." This purpose could be effected only by adopting some measure which should compel banking corporations to hold in their possession and control a constant specie reserve, and thus to carry into practical operation the theory of a financial system based on specie, and a currency redeemable at all times in coin. It certainly is difficult to see how the intentions of the legislature, as declared in the title of the act, could be promoted by requiring of banks only the appearance or show of a weekly or monthly average of specie. If such is the true construction of the statute, a bank may conduct its business without keeping on hand any definite amount of specie in proportion to its liabilities. Its transactions may rest almost exclusively in paper. It may own or possess but a very small sum in coin. It can comply with the statute by having on hand for a single day in a week or month sufficient coin to make up the required average in its returns; and this amount may be procured for the purpose by borrowing or a temporary purchase, to be restored or re-sold as soon as the return is made, instead of being kept as the property of the bank, and forming a part

of the specie basis, on which the banking system of the Commonwealth is intended to be founded. If the language of the statute were more ambiguous than it really is, we should be slow to give such a construction to it as would lead to a result so much at variance with the manifest design of the framers of the act.

It is urged in behalf of the defendants that as the business of a bank, however cautiously and prudently conducted, is of a nature to expose it to unusual and unexpected demands for specie, either to redeem its circulation or to answer the calls of depositors for coin; and as a sudden and large increase of deposits may, at any time, cause the specie kept in reserve to fall below the required percentage, a literal compliance with the requisition to keep on hand fifteen per cent. of its liabilities would be impracticable. Doubtless there may be cases where an emergency may arise, which could not have been anticipated, by which a reduction in the amount of specie below the given standard might temporarily occur. But such deficiency, if promptly supplied, would not be deemed an infraction of the statute, if it was made to appear that it was the result of accidental circumstances, and that the business of the bank was so managed as in the ordinary course of its operations to keep in its vaults the required amount of specie. This would be a substantial compliance with the requirement of the statute. Nor are we able to see why a bank may not conduct its affairs in such manner as to have in its possession a specified amount of specie, as well as to maintain a prescribed average. An unusual demand might reduce this average in like manner as the same cause would operate to diminish a certain percentage below the required amount. The argument applies with equal force to either view of the statute, and as an argument *ab inconvenienti* is not entitled to much weight.

These views of the construction to be given to the statute have led us to the conclusion, that it imposes on a bank the obligation of keeping on hand a sufficient amount of specie for the ordinary demands of its daily business, and also a reserve of fifteen per cent. on its liabilities for circulation and deposits, after meeting and discharging those which are presented for liquidation and payment. As the defendants do not show that their omission to have this amount of specie in their keeping, on the days when it is shown to have fallen below the given standard, was the result of any unexpected

demand on them by their creditors, but, on the contrary, that it was caused by a course of business conducted with a view to keep only a weekly average of specie to the amount designated in the statute, it follows that they have violated the statute, and on this point the allegations in the information are sustained.

The remaining allegations in the information, which are now insisted on, may be briefly disposed of. The right of a bank to borrow money from another bank is nowhere expressly prohibited. On the contrary, the right to do so would seem to be recognized in Gen. Sts. c. 57, § 26, by which it is expressly provided that debts due from one bank to another, including bills of the bank indebted, shall not be considered as within the prohibition of § 25, which limits the indebtedness of a bank to twice the amount of its capital stock, exclusive of sums due for deposits not bearing interest. The only restraint on the power to contract such a debt is contained in § 63 of the same chapter, which provides that no bank shall make any contract for the payment of money at a future day certain, or with interest. This language is certainly broad enough to cover a contract by one bank with another to pay money at a future day. That it was intended to include such contracts is strongly implied from the exception to the prohibition, by which it is provided that "all debts due to one bank from another may draw interest." The conclusion would seem to be inevitable that the legislature, in making this provision, had in view debts due from one bank to another, and intended to bring them within that part of the section which prohibits them from being payable on time, but to exempt them from the prohibition of drawing interest. We can see no sufficient reason for limiting this exception to any particular class of debts existing between banks. It is applicable to every species of indebtment which may lawfully be due from one bank to another. It was suggested by the counsel for the defendants that in *Faneuil Hall Bank* v. *Bank of Brighton*, 16 Gray, , this court, had given such construction to this provision of the law as to authorize a bank to borrow money from another bank payable at a future day. But this is a misapprehension. No question arose in that case as to the right or power of one bank to borrow money from another bank. The point then decided was, that a draft drawn by one bank upon another, payable at a future day, was not on its face unlawful, because

there might be transactions between banks, creating balances due from one to another, which might well authorize the making of drafts on time. But there was nothing in that case which tends to sanction the creation of a debt by the borrowing of money by one bank of another payable at a future day. So far, therefore, as the defendants entered into contracts by which they borrowed money of another bank payable at a fixed time, they violated the law; but beyond this the allegation in the information, setting forth that they borrowed money of other banks payable with interest, in violation of the statute, is not sustained.

The only remaining ground on which it is claimed that the defendants have acted contrary to any of the requirements of the statute, is, that they have delivered their bills to other banks for specie lent, with an agreement that they should not be returned for redemption until after the expiration of a certain number of days. This transaction is in direct contravention of the express provisions contained in Gen. Sts. c. 57, § 67, which imposes a penalty on any bank "which loans or issues any of its notes or bills with an agreement or understanding that they shall not be put into immediate unrestricted circulation, or that they shall not be returned to the bank within a limited time." On language so clear and explicit we cannot engraft exceptions derived from the supposed causes which originally gave rise to the enactment.

In considering the decree which ought to be passed in the case, it has seemed to us that, as the acts of the defendants, so far as they were contrary to law, were done under a mistake or misapprehension of the provisions of the statutes, and with no intent to commit a wilful violation of the enactments for the regulation of banks; and as no other or further similar acts are threatened or intended by the defendants, the further prosecution of this suit is not required in furtherance of justice, or to enforce a due observance of the laws. We therefore are of opinion that, on payment of costs by the defendants, the injunction heretofore granted should be dissolved, and further proceedings in the case discontinued.

Decree accordingly.

B. R. Curtis & C. Cushing for the defendants.

Foster, A. G., for the Commonwealth.

Superior Court of Judicature of the Province of Massachusetts Bay. — February Term, 3 Geo. 3.

ROGERS *vers.* KENWRICK.[1]

(From Barnstable.)

It is no objection to an Award that it settles the Boundary Line between adjacent lands of the Parties without ordering Releases.
Hutchinson, C. J., & Oliver, J., diss.

This Action was Debt upon an Arbitration Bond. No Award pleaded. Award was read as follows: "We do determine and settle the northwest Corner Bound as settled by us is an Heap of Stones," &c., "which appears to be the reputed known N. W. Bound for many Years, and nothing appears but was always so," &c., "and that the said Kenwrick pay," &c.[2] Now 'twas answered by

Mr. Paine.—That the Arbitrators had taken upon them to determine a Title of Freehold, and therefore the Arbitration void and no Award. Where the Right of Freehold is in Debate, the Property cannot be transferred by an Award; the Arbitrators only are in Stead of the Parties, and can do no more than can be done by them. Now the Parties themselves cannot pass corporeal Inheritances without solemn Livery. 1 Roll. Abr. 242. 14 H. 4, 19, 24. 9 H. 6, 6. 3 H. 4, 6. 11 H. 4, 12. Keilw. 99. 1 Leon. 228. 1 Roll. Abr. 244. 1 Bacon, 132. But if Condition of the Obligation is to stand to Award of Arbitrators, who award the Land to one, and that the other shall release, who does not, the Penalty of the Obligation is forfeited, but if no Act to be done by the Party, as releasing, is awarded, it is not forfeited though the other do not convey to him a good Title.[3]

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[1] Quincy, 62.

[2] The replication further alleged that the defendant had not kept up to the tenor of the award, but had broken over the line by cutting wood on the land of the plaintiffs. And among the papers on file appeared the deposition of Jonathan Kenwrick, sealed up and directed, "For the Clerk of y^e^ Superior Court of Judicature," &c. This being opened by the present Clerk of the Supreme Judicial Court, it appeared that the deponent testified to seeing the defendant "cutting wood about six rods to y^e^ westward of y^e^ range that was settled by y^e^ arbitrators."

[3] Among the papers on file appears one which would seem to have been part of Mr. Paine's brief, since it contains the above argument and list of authorities almost *verbatim*; the whole being taken from Bac. Ab. Arbitrament, A.

Mr. Otis, contra. — I grant the Award to be void if the Arbitrators have determined the Freehold; but here they have not, they have only determined the Line; the real Boundary is but a mathematical Line without Breadth or Thickness; the settling that does not affect the Freehold.[1] 1 Bacon, Tit. Arbitra. I think then a Bond conditioned to abide by such Award is good, and the Award good, and if not complied with, the Obligation should be forfeited.

Paine.—When they settle the Line, they say to whom the Land on each Side belongs. They have awarded nothing to be done; they should have ordered Releases.

Judgment for the Plaintiff.[2] *Russell, Cushing, Lynde,* against *Oliver* & *Ch. Justice.*

Ch. Just. very warmly against the Determination.*

* *Quære,* if this Case is not agreeable to Law?

RECENT ENGLISH CASES.

Court of Common Pleas. — Sittings in Banc after Trinity Term.

Before WILLIAMS, WILLES, BYLES, and KEATING JJ.

BUCKMASTER and Another *v.* RUSSELL.—June 21, 1861.

Statute of Limitations—Letter offering to pay by instalments.

A letter in these terms—"I have received a letter from Messrs. P. & L., solicitors, of B., requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army in 1851. But as you declare it was not settled, I am willing to pay you 10*l.* per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly."—*Held,* not a sufficient acknowledgment to take the case out of the Statute of Limitations.

This action was brought for goods sold and delivered by a tailor against the defendant, an officer in the army, to which

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[1] See *Searle* v. *Abbe,* 13 Gray, 412.

[2] S. P. *Jones* v. *Boston Mill Corp.* 6 Pick. 148. *Goodridge* v. *Dustin,* 5 Met. 363. In this case the previous decision in *Whitney* v. *Holmes,* 15 Mass. 152, was partially overruled, and the rule stated by Mr. Justice Hubbard to be, that an award which settles a boundary, "although it will not have the direct effect of conveying lands, will yet conclude the parties from disputing the title or boundary which is distinctly settled by the award, and that it shall operate by way of estoppel." See also *Searle* v. *Abbe,* 13 Gray, 409.

he pleaded nunquam indebitatus, the Statute of Limitations, and payment. The plaintiff gave in evidence at the trial the following letter, as taking the case out of the statute :—

"April 2, 1860.

"I have received a letter from Messrs. Peard & Langdon, solicitors, of Barnstaple, requesting me to pay you an account of 40*l*. 9*s*. 6*d*. I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army in 1851. But as you *declare* it was not settled, I am willing to pay you 10*l*. per annum until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly.

"R. B. RUSSELL."

The plaintiffs were nonsuited, but a rule nisi had been obtained to show cause why the nonsuit should not be set aside, and a verdict for the plaintiffs entered for 26*l*. 10*s*.

Karslake, Q. C., now showed cause.—It was admitted at the trial that the plaintiffs repudiated altogether the defendant's offer of payment of 10*l*. a year, and that repudiation was in writing. The law on this point was settled in a great measure in *Tanner* v. *Smart*, 6 B. & Cr. 602, followed by *Rackham* v. *Marryatt*, 2 Jur., N. S., 619; S. C., on appeal, 3 Jur., N. S., 495. So *Smith* v. *Thorne*, 16 Jur., 333. This is not a sufficient acknowledgment by the defendant to take the debt out of the statute; he makes a condition.

Lucius Kelly, in support of the rule.—This letter is a full admission of an existing debt, for the writer takes our word that the claim is not settled altogether, and that is a complete acknowledgment. Then as to the alleged conditition in the latter part of the letter, the cases cited are extreme cases, but are all consistent with my contention. In *Rackham* v. *Marryatt*, it was shown, on the face of the promise, that the party was at that time unable to pay. There is no such thing here. *Hart* v. *Prendergast*, 14 M. & W. 741, is in favor of the mode of declaring adopted here. [WILLIAMS J. —To bind him, they must bind themselves; that they have not done.] In this letter the defendant engages to pay the whole debt; that makes the difference from *Smith* v. *Thorne*. The case of *Rackham* v. *Marryatt* has been regarded as an extreme case in *Sidwell* v. *Mason*, 3. Jur., N. S., 549; and in *Collis* v. *Stack*, 1 H. & Norm. 605, Pollock C. B. stated the question in this class of cases to be, whether the statements

as to the time of payment are merely excuses for non-payment, or conditions on which payment is to be made. [WILLIAMS J.—That is, where there is an unqualified admission of a debt; here there is no admission.] He says, as we declare it is not paid, he is willing to pay it; that is, in effect, an admission.

WILLIAMS J.—This rule must be discharged. The principle on which an acknowledgment by the debtor operates to bar the Statute of Limitations has been in effect settled ever since the case of *Tanner* v. *Smart;* and the principle has been expressed over and over again in the common law courts, but never better expressed than in *Phillips* v. *Phillips*, 3 Hare, 299, in which Sir J. Wigram, V. C., with characteristic lucidity of language, says, "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense, and for that purpose, the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies, from the simple acknowledgment, a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." The question in this case is, whether the letter contains an acknowledgment from which a promise can be implied to pay the debt barred by the statute. As to going on the special contract, it is plain that this special promise would not bind the defendant who proffered it, unless it were accepted by the plaintiffs, to whom it was proffered; and no such thing took place as an acceptance by them of the defendant's proposal; therefore it would have been impossible for the plaintiffs to have proceeded on the special contract, even if their particulars would have allowed them to do so. Then the question is, whether this letter contains a sufficient acknowledgment; and in my opinion it contains no acknowledgment of the existence of the debt at all; on the contrary, the writer shows himself to be anxious to guard himself from that. It is particularly that no special or general promise to pay can be implied; the statute, therefore, must operate, and this rule must be discharged.

The rest of the Court concurred.—*Rule discharged.*

Court of Queen's Bench.—Trinity Term.

Before WIGHTMAN, CROMPTON, and BLACKBURN, JJ.

TWEDDLE *v.* ATKINSON, Executor of WILLIAM GREY, Deceased. — June 7, 1861.

Contract—Consideration—Privity.

Mere blood relationship is not a sufficient consideration in law to support an assumpsit. A stranger to the consideration cannot sue on a contract, although there be privity by blood between him and the contracting parties, and the contract was made for his benefit.

Declaration, that the plaintiff was the son of one John Tweddle, deceased, and, before the making of the agreement hereafter mentioned, married the daughter of the said William Grey, deceased; and, before the said marriage of the plaintiff, the said William Grey, in consideration of the said then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said William Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed; that after the said marriage, and in the lifetime of the said William Grey and of the said John Tweddle, they, the said William Grey and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises, and the said William Grey also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter, and the said John Tweddle entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Grey, by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff—they, the said William Grey and John Tweddle, made and entered into an agreement, in writing, in the words following; that is to say—"July 11, 1855. Memorandum of an agreement made this day between William Grey of the one part, and

John Tweddle of the other part.—Whereas it is mutually agreed that the said William Grey shall and will pay the sum of 200*l.* to William Tweddle, his son-in-law, railway inspector, residing at Thornton, in the county of Fife, in Scotland, and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of 100*l.* to the said William Tweddle, each and severally the said sums, on or before the 21st August, 1855. And it is hereby further agreed by the aforesaid William Grey and the said John Tweddle, that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified." Averments, that afterwards, and before this suit, the plaintiff and his said wife, who is still living, ratified and assented to the said agreement, and that he is the said William Tweddle therein mentioned; that the said 21st August, 1855, elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of 200*l.* paid by the said William Grey or his executor. Breach, non-payment of the same. Demurrer, and joinder in demurrer. The plaintiff's points were as follows:—That the blood relationship is in law sufficient to entitle the son to sue on the contract made by the father for the son's benefit; that where the father gives a consideration for the son's benefit, the law presumes him to have been induced to do so by such relationship, and places the consideration procured by such relationship on the same footing as if it were procured by or proceeded from the son himself: that the blood relationship of the son is in such cases equivalent to a request by the son: that the law regards blood relationship as conferring on various transactions a character which they would not otherwise have, as in the case of advancements of children, and covenants to stand seised to uses, and the additional proof required in cases of inofficious wills: that there is no universal rule of law, even where there is no relationship, that a consideration must proceed from the party who is to have the benefit, because money paid by A. in a bargain and sale raises a use for the benefit of B.: that the case of *Price* v. *Easton*, 4 B. & Ad. 433, is either not law, or not here applicable.

Edward James, Q. C. (*Henderson* with him), in support of the demurrer.—The plaintiff is an entire stranger to the consideration, and cannot, therefore, sue on this contract. There is no privity between the plaintiff and the promisee.

Price v. *Easton*, 4 B. & Ad. 433, shows that this action cannot be maintained.[1]

THE COURT then called on

Mellish, in support of the declaration.—The general rule of law, no doubt, is, that a mere stranger to the consideration cannot sue on a contract; but to this general rule an exception is allowed in the case of parents making provision for their children. The relationship between the parties makes the father the agent of the son to make the contract. [CROMPTON J.—Can the plaintiff sue as well as be sued on this contract? WIGHTMAN J.—There is no mutuality, only a simple liability.] There is privity by blood, and the relationship existing between the parties is a good consideration. In *Dutton* v. *Poole*, 2 Lev. 210, where a tenant in fee-simple being about to cut timber for his daughter's portion, the defendant, his heir-at-law, in consideration of his forbearing to do so, promised to pay a sum of money to the daughter, the action by the husband of the daughter was held to be well brought. [CROMPTON J.—Two great changes have taken place in the law of contracts since that case was decided. Now, natural love and affection will not raise an assumpsit; nor in a case where A. promises B. to pay C. a sum of money, can C. have an action of assumpsit.] The law recognizes in many cases a consideration of blood, as in the instance of a covenant to stand seized. [CROMPTON J.—No one will dispute that a consideration of marriage or of blood is a good consideration in many cases where the parties contract by deed; but your argument comes to this, that a son can bring an action against his father, on a consideration of natural love and affection, to provide for him; a hundred cases have decided that such a consideration will not support an assumpsit.] [BLACKBURN J.—Do you find the exception to the general rule of law which you contend for recognized in any modern case?] Not expressly recognized; but in the report of *Price* v. *Easton* the counsel for the defendant, in his argument, distinguishes that case from *Dutton* v. *Poole*, on the very ground that in the latter case there was privity by blood, and the daughter was prejudiced by loss of her portion. *Price* v. *Easton* is not like the present case, for there existed no relationship between the parties. There is no modern case precisely like the present, and all the old

[1] See Thomas v. Thomas, 2 Q. B. 851.

authorities are very strong to show that this action will lie. In *Dutton* v. *Poole*, which was affirmed in the Exchequer Chamber, T. Raym. 302, the Court say "that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children." In *Bourne* v. *Mason*, Vent. 6, a case was cited where A. promised a physician, that if he effected a certain cure, he (A.) would give him a sum of money, and another to his daughter; and it was resolved that the daughter might maintain assumpsit, and on the ground of the relationship existing between father and daughter. [WIGHTMAN J. —If one of the two fathers has paid his portion (100*l.*), could he sue the other, if that other had not paid his share?] The child is the proper person to sue. *Rippon* v. *Norton*, Cro. Eliz. 849–881. The modern cases are contradictory as to whether the father can sue; according to the old authorities he could not. The consideration is entering into the contract, not the performance, because each of the fathers wants to make a provision for the children.

Edward James, in reply, was not heard.

WIGHTMAN J.—No doubt some of the old decisions support the proposition that a stranger to the consideration may bring an action on a promise made for his benefit. The strongest case cited in favor of the plaintiff is that where a defendant promised a physician, if he effected a certain cure, he would give him a sum of money, and another to his daughter, and it was held that the daughter might maintain an action on such a promise. But no modern case was cited to support such a proposition; on the contrary, it has been decided by all the late cases, that a party who is a stranger to the consideration cannot take advantage of a contract.

CROMPTON J.—I am of the same opinion. It is admitted that the plaintiff cannot succeed in this action unless the present case, by reason of the relationship of the parties, is an exception to the general rule, that the consideration must move from the parties to the contract. It is attempted to support this action by certain old authorities; but those old authorities are not applicable to the modern action of assumpsit as now established. At the time those old cases were decided the law relating to this subject was not settled. The recent cases have overruled those old authorities, and it is quite clear law that natural love and affection will not raise

an assumpsit, and that the consideration must move from the parties to the contract. It is a monstrous proposition that a person could be a party to a contract for one purpose, and not for another, so that he might sue upon a contract without being liable to be sued. If the old cases had not been overruled by the more recent authorities, I should be quite prepared to hold that they cannot be supported.

BLACKBURN J.—The declaration, in its introductory part, states a verbal promise to the plaintiff to pay him a sum of money in consideration of marriage; the plaintiff might, but for the Statute of Frauds, have sued on such an agreement. Subsequently to the marriage a fresh agreement is entered into between the two fathers, by which the one agrees to pay 200*l.*, and the other 100*l.*, to the plaintiff. The question is, whether the child of one of the parties to the contract can sue. It is clear by the modern cases that he cannot sue. It is admitted to be a general rule of the law of contracts, that the consideration must move from the promisee; but to this rule it is alleged that there is an exception, that where a father enters into a contract for the benefit of his child, though the consideration move from the father, the relationship existing between the parties is sufficient to enable the child to sue. Although we cannot in this court overrule the case decided in the Exchequer Chamber,[1] I think that the uniform course of the law shows that the ground on which the doctrine laid down in that case was supported is overruled, and that this action cannot be maintained.—*Judgment for the defendant.*

Court of Queen's Bench.—Hilary Term.

REGINA, on the Prosecution of GREGORY *v.* ALLEN.—Jan. 20, 1862.

Criminal prosecution — Nolle prosequi — Power of Attorney-General to enter.

In criminal proceedings it is competent to the Attorney-General, as the representative of the Crown, at his discretion, to enter a nolle prosequi, and the Court will not interfere.

The facts of this case were as follows:—In the month of September, 1860, a charge was preferred against Gregory, the prosecutor, an out-door officer of the customs, by Allen,

[1] Dutton *v.* Poole, 1 Vent. 318; 2 Lev. 210; T. Raym. 302.

the defendant, of stealing spirits in conjunction with himself. The charge came on for investigation before one of the commissioners of customs, upon which occasion Allen deposed that the offence was committed on the 11th November, 1859. Gregory, on being called upon for his defence, requested that time might be allowed him to produce his witnesses; and for this purpose the case was adjourned until the 13th September. To enable him the more effectually to meet the charge, Gregory in the meantime applied for permission to inspect a certain book kept at the custom-house, in which it was customary to register the time and the specific duties in which the out-door officers were employed, his object in so doing being to trace his occupation on the day and at the time alleged. This, however, was refused, and he now stated in his affidavit that he had been informed that Allen, during the interval which took place between the first and second hearings of the charge before the commissioner, had applied for and obtained permission to inspect the book. On the 13th September, when the inquiry before the commissioner was resumed, Allen deposed that his former statement was correct, except as to the date on which the alleged offence was committed, which he, on this subsequent occasion, laid upon the 18th April, 1860, instead of the 11th November, 1859. The result was, that Gregory and ten others were dismissed from their employment. They then memorialized the Board of Customs, praying that they might be indicted, and so have an opportunity of clearing themselves of the charge by the verdict of a jury; but this application was in like manner dismissed. On the 18th September Gregory and the others preferred a charge of perjury against Allen, before the lord mayor at Guildhall. The solicitor of the customs appeared on behalf of Allen, and the lord mayor, being of opinion, in consequence of certain discrepancies in the evidence of one of the witnesses for the prosecution, that a jury would not convict, declined to commit the prisoner. Upon this, Gregory and the other discharged officers preferred two indictments against Allen at the Central Criminal Court, when true bills were found against him. Being again brought before the lord mayor, Allen was a second time defended by the solicitor of the customs, and was eventually discharged upon his own recognizances. The indictments were then removed into this court by certiorari; but a rule being applied for, for the defendant to come in and plead, it was discovered that no

recognizances had been entered into by Allen, and that the Attorney-General had entered a nolle prosequi.

J. J. Powell, under these circumstances, now moved for a rule calling on the defendant to show cause why the prosecutors should not be at liberty to proceed to the trial of two indictments for perjury upon which true bills had been found at the Central Criminal Court, and which had since been removed into this court by certiorari.—The Attorney-General has no authority in such a case to enter a nolle prosequi without calling on the prosecutors, and hearing all parties. The proper course of proceeding in such cases is to be found laid down in the Crown Circuit Companion, 22, and 2 Gude's Crown Practice, 550, citing *Rex* v. *Evelyn and Others*, Trin. Vac., 1820, where it was held that the application for a nolle prosequi must be by petition to the Attorney-General, stating the facts; but where it is for a public offence he will not interfere. [CROMPTON J.—You must contend that the Crown is incapable of granting a pardon.] Then, assuming that the Attorney-General has the power of entering a nolle prosequi, such operates only as a temporary stay of proceedings, and the Court can order the matter to go on. *Goddard* v. *Smith*, 6 Mod. 262, where HOLT C. J. says, "The entering a nolle prosequi was only putting the defendant sine die, and so far from discharging him from the offence, that it did not discharge any further prosecution upon that very indictment;"[1] and further, "That he had known it thought very hard that the Attorney-General should enter a nolle prosequi upon indictments, which practice first began in the latter part of King Charles the Second's reign;" *Stretton* v. *Taylor*, Leon. 161; *Rex* v. *Ridpath*, 10 Mod. 152. [COCKBURN C. J.—Has this Court ever awarded fresh process after a nolle prosequi?] The passage already cited from *Goddard* v. *Smith* shows that the Court has the power of doing so. [BLACKBURN J.—The Modern Reports are a somewhat loose compilation.]

COCKBURN C. J.—There will be no rule in this case. The Attorney-General, as the representative of the Crown, has an undoubted right, in matters of criminal judicature, to enter a nolle prosequi, and so to stay proceedings on an indictment or information. No instance has been referred to in which the Court, after the entry of a nolle prosequi

[1] See Bacon v. Towne, 4 Cush. 235.

by the public prosecutor, has taken upon itself to issue fresh process; and it is not for us to create a precedent, where none exists, so contrary to the established views of the profession, and fraught with so much inconvenience to the public. Upon indictments in criminal proceedings it may be, generally speaking, that the law officer of the Crown would act wisely in calling the prosecutor before him before entering a nolle prosequi, and thereby barring the prosecutor from further steps in proceedings meant for the punishment of wrongdoers; but it is easy to conceive, on the other hand, that cases may exist when, from his knowledge of the circumstances, the Attorney-General may be justified in staying proceedings without going through this preliminary. It is not for us to suppose that there has been any abuse of his power by the Attorney-General; but even if such were the case, the remedy is not by application to this Court to interfere by the exercise of its power, but by holding him responsible to the great tribunal of this country, the High Court of Parliament. We cannot, therefore, take upon ourselves to exercise a jurisdiction we have never yet exercised.

CROMPTON J.—I am of the same opinion. It seems to me that even the raising of a doubt upon such a question would have a very mischievous effect. In this country, where private individuals are entitled to the privilege of prosecuting in the name of the Crown, it is indispensable that there should be some competent authority to decide whether an indictment should proceed or not. Such power is constitutionally vested in the Attorney-General, and not in this Court; and, moreover, I see nothing in the case as stated which would warrant us in interfering if we had the power. Then it is said the Court may award process; but I am of opinion, on the other hand, that it is open to the Attorney-General, in all cases of criminal prosecution, to interfere in the name of the Crown, and deal with them as may appear to him proper. The authorities cited do not appear to support the position contended for.

BLACKBURN J.—I am of the same opinion. This peculiar branch of the prerogative is intrusted to the law officer of the Crown, whose province it is to determine whether a prosecution is to go on or not. What the Attorney-General may consider it proper to do, whether right or wrong, it is out of our power to interfere.

MELLOR J.—If we interfered in the manner suggested, the obvious consequence would be a most serious conflict between this Court and the Attorney-General. It is clear, therefore, that there can be no rule.—*Rule refused.*

Exchequer Chamber.—Sittings after Michaelmas Term.

Appeal from the Court of Exchequer.

Before WIGHTMAN, CROMPTON, BLACKBURN, WILLIAMS, WILLES, BYLES, and KEATING, JJ.

WHITMORE *v.* SMITH.—Nov. 30 and Dec. 2, 1861.

Award—Umpire—Consultation of, by arbitrators, and adoption of his opinion—Pleadings—Evidence.

Various matters in difference being referred to the decision of two arbitrators, the parties consented that they might, in case of difficulty, consult a third person, who was named; and the arbitrators did so on one out of the whole number of questions arising in the investigations, and they adopted the opinion which he gave them upon it, without, as far as appeared, exercising any independent opinion on it, and made their award on the whole of the matters referred. — *Held*, reversing the judgment of the Court of Exchequer, that the award was not thereby invalidated.

Appeal by the plaintiff against the decision of the Court of Exchequer in discharging a rule of that Court, obtained by the plaintiff, to show cause why the verdict entered for the defendant on the third plea, on the trial of this cause, should not be set aside, and instead thereof a verdict be entered for the plaintiff, on the ground that the award was the award of the arbitrators, and that the arbitrators having taken, and acted upon, the opinion of Mr. Rotton, did not vitiate the award; and that, even if the arbitrators acted improperly in that respect, it was not a matter admissible in evidence under the third plea, or pleadable in bar to the action on the award. The declaration stated, in substance, that the plaintiff, the official assignee of William Henry Bainbrigge, a bankrupt, sued the defendant, for that, before the making of the agreement thereinafter mentioned, the said William Henry Bainbrigge, being then a trader, and unable to meet his engagements with his creditors, duly presented his petition to the Court of Bankruptcy, &c.; and the said William Henry Bainbrigge had duly, and in pursuance of sect. 211

of the Bankrupt-law Consolidation Act, 1849, made, at the private sitting therein mentioned, held under the said petition, a proposal for the future payment of his debts, viz., by conveying and assigning by deed to the plaintiff all his estate and effects as trustee, upon trust to realize, collect, and receive the same, and to divide the same amongst the creditors of him, the said William Henry Bainbrigge, &c., which said payment was afterwards duly assented to and confirmed in the manner mentioned in the 215th section of the said act, &c.; and such proceedings were taken in the said court upon the said petition, that the plaintiff was, before the making of the said agreement, appointed by the said court to be the official assignee to act in the matter of the said petition, in pursuance of the 213th section of the said act, and all the estate and effects of the said William Henry Bainbrigge became and were vested in the plaintiff, as such official assignee, under sect. 218 of the said act; and that at the time of the making of the said agreement certain differences were depending between the plaintiff, as such official assignee, &c., as aforesaid, and the defendant, respecting certain unsettled accounts and cross claims between the said William Henry Bainbrigge and the defendant; and thereupon it was ultimately agreed between the said plaintiff, as such official assignee, &c., and the defendant, that the said accounts should be taken by one J. Percivall and one S. Daniell, and the balance ascertained, and that neither party should be at liberty to re-open the accounts, and that any balance found due from the said William Henry Bainbrigge should be provable on his estate, and that any balance found due from the defendant should be recoverable by the plaintiff as such official assignee, &c., under the said petition. Further averment, that afterwards the said J. Percivall and S. Daniell took upon themselves, &c., the said arbitration, and duly made and published their award, in writing, of and concerning the said premises so referred to them, &c., and did thereby find, award, and determine that at the time of filing the said petition there was, and still was, due and owing from the defendant to the said William Henry Bainbrigge, on the balance of accounts between them, brought before the notice and consideration of the said arbitrators, and supported by proof, the sum of 364*l.* 2*s.*, of which the defendant afterwards had due notice. Averment of readiness and willingness in the plaintiff and the said William Henry Bainbrigge to do every-

thing, and of everything having happened to entitle the plaintiff, &c., to be paid by the defendant the said sum, and maintain this action, &c. Pleas—first, that it was not mutually agreed between the plaintiff and the defendant as in the declaration alleged; secondly, denial of J. Percivall and S. Daniell having taken on themselves the burden of the arbitration, &c., as alleged; thirdly, that the said J. Percivall and S. Daniell did not make and publish their award in writing, &c., as alleged; fourthly, that the said agreement was in the words and figures following:—

"In the matter of a private arrangement of William Henry Bainbrigge.

"It is agreed that the accounts between Mr. William Henry Bainbrigge and Mr. G. Smith (the defendant) shall be taken by Mr. J. Percivall and Mr. S. Daniell, of, &c., and the balance ascertained; that neither party shall be at liberty to re-open the accounts; and that any balance found due from Mr. Bainbrigge shall be provable on his estate, and that any balance found due from Mr. Smith shall be recoverable by the trustee or trustees under the petition for private arrangement; the transactions of Mr. J. Smith to be considered as the transactions of Mr. G. Smith (the defendant); and in case of any disagreement between the above accountants they shall have power to nominate an umpire."

Dated the 30th August, 1858, and signed by the respective attorneys of Bainbrigge and the defendant.

Averment, that after the making of the said agreement the said J. Percivall and S. Daniell appointed one Henry Rotton to be umpire in the matters of the said agreement; and the said J. Percivall and S. Daniell then entered on the said reference, and considered the matters in difference submitted to them, and disagreed respecting certain of the said matters in difference before they made their said award; and after such disagreement, and before they made their award, gave notice in writing to the said umpire, stating that they could not agree, and submitted the said matters, on which they could not agree, to the decision of the said umpire. Further averment, that the said J. Percivall and S. Daniell did not make their award under their hands within three months after they had been appointed arbitrators and had entered on the said reference; and that the time for the said J. Percivall and S. Daniell making the same had expired, and the power and duty of making the same had finally devolved on the said um-

pire, before the said J. Percivall and S. Daniell made their said award. Further averment, that the said Henry Rotton made his award respecting part of the matters in difference referred to arbitration under the said agreement, and on which the said J. Percivall and S. Daniell had disagreed, after the power and duty of making the award had devolved on him, and before the said J. Percivall and S. Daniell made their said award. Issues thereon. The following is the substance of the special case submitted to the court of error:—The plaintiff is the official assignee of William Henry Bainbrigge, and he declared upon the agreement (set out in the fourth plea). The case then pursued the statement of facts on the declaration, and set out the third plea as above, and issue, &c., and then proceeded, in substance, as follows:—The cause came on to be heard, before Bramwell B., at the Spring Assizes for Staffordshire, 1860, when the following evidence was adduced for the plaintiff in support of the issue on the third plea:—That E. H. Collis was attorney for the plaintiff, and also acted as attorney for the bankrupt in the arbitration; that at the time of the bankruptcy the bankrupt claimed a sum of about 6000*l.* as due to him from the defendant, and that the defendant claimed a sum of about 2000*l.* as due to him from the bankrupt: that Mr. W. Morgan acted as the attorney of the defendant in the matter of his claim, and that after some discussion the agreement was entered into as set out and stated above: that the registrar, acting as commissioner of bankruptcy in the matter of this petition, sanctioned the agreement: that several meetings took place before the arbitrators: that E. Ellis, as the petitioner's attorney, attended all the meetings before the arbitrators; that Mr. Morgan attended the meetings as attorney for the defendant; that the arbitration was entered upon in due time: that at the first meeting the arbitrators, in the presence of the attorneys on either side, arranged to appoint Henry Rotton as umpire in case of their disagreement: that they left the meeting in order to and did see him on the subject: that upon their return they stated to the parties present, amongst whom were the attorneys on either side, *that Rotton declined to accept the umpirage, and that they had arranged with him that they should consult him* on points arising under the reference as to which they felt a difficulty, but *that Rotton should not be called upon to attend the meeting, nor to hear evidence*, nor to do more than advise them upon points on which they

felt a difficulty; that Collis never went before Rotton, nor did Morgan; that the plaintiff's attorney would have objected to Morgan going before Rotton, as that would have been contrary to the arrangement. It further appeared that statements were sent by the arbitrators to Rotton; that it was understood by the plaintiff's attorney that the arbitrators had agreed to leave a question as to 8000*l.* to Rotton, without disagreeing about it; that Morgan expressed himself satisfied as to what was told him of the arrangement with Rotton, &c. It also appeared from the evidence of J. Percivall, one of the arbitrators, that the award mentioned in the third plea (which was *then produced*) was the award of himself and Mr. Daniell; that at the first meeting Morgan and J. Smith were present; that he (Percivall) and Daniell said that they thought they had better appoint an umpire; that they then went and saw Rotton; that they stated to him they wanted him to be umpire; that he at first declined to be so, as he was fearful he could not give time; and that they told him they only wanted to take his opinion and advice when they felt any difficulty; he then consented to act on that understanding; that during the reference the arbitrators did take Rotton's opinion on two questions—once on a question of the terms on which an adjournment should take place, on another occasion about the reception of evidence; that after the meetings had closed, the arbitrators agreed to take Rotton's opinion upon certain points of difficulty; these were points in the reference upon which the arbitrators felt a difficulty, but did not discuss between themselves, nor attempt to agree upon. The witness Percivall said, "We went to consult Rotton to save time." The arbitrators did not differ upon, and did not discuss and did not agree upon, these items, but agreed to be bound by the opinion of Rotton, as far as these items were concerned. [The award was then set out at length, but as the substance of it is given above, it is not necessary to insert it here.] The evidence for the defendant in support of the issue on the third plea showed, that at the first meeting the arbitrators said they would ask Rotton to be umpire; that they left the room, &c. (as in the evidence for the plaintiff), and, on returning, said that Rotton was not willing to attend the meetings, but that he would discuss with the arbitrators any question they wished to consult him upon; that Morgan on several subsequent occasions urged that Rotton should hear the evidence, or at least see

the advocates. Upon all the evidence, Bramwell B. directed the jury to find a verdict for the defendant on the issue on the third plea, and for the plaintiff on the other issues, and gave the plaintiff leave to move to set aside that verdict, and instead thereof enter a verdict for himself for 364*l.* 2*s.*, the Court of Exchequer to have authority to draw any inferences of fact which a jury might properly draw, and both parties to be bound thereby. On the 5th June, 1860, the Court of Exchequer discharged the rule. It is to be taken, for the purposes of this case, that the jury found that the document produced, and relied on as an award, by the plaintiff, was jointly executed by the two arbitrators as and for their award, but that in doing so they adopted and acted upon the opinion of Mr. Rotton upon the questions on which he was consulted as above mentioned, without exercising any independent judgment of their own on such questions. The question for the decision of the Court of Appeal is, whether the judgment of the Court of Exchequer is correct.

Dowdeswell, for the plaintiff.—This is a good award, notwithstanding the objections made to it; for supposing a person of ever so much learning and attainments appointed—for instance, a barrister of great experience—still numerous questions must arise, ex. gr. in chemistry, seamanship, commercial pursuits, science, with which he could not be familiar enough to dispense with advice, and in which he must, as was constantly done, consult and take the opinion of a chemist, &c., to guide his decision, and without which aid he could not possibly form a decision himself. The case of *Eads* v. *Williams*, 1 Jur., N. S., 193, has been urged against us; but we do not dissent from that decision. Here the arbitrators only took the opinion of Rotton as to a part of the matters submitted to reference. [Crompton J.—They exercise a judicial mind upon the whole matters, admitting something to influence them, perhaps improperly.] Yes; this is merely an incidental question in a large and complex inquiry which is submitted to the umpire; and the parties having agreed that Rotton should be consulted, he is consulted, and gives his opinion; and then they say, "We will adopt this subsidiary opinion." [Blackburn J.—Here they take up this opinion of Rotton without any exercise of independent judgment, which is not like the case of the chemist which you put.] If the doctrine of the other side were to prevail, there would be no safety in referring; no award

could be upheld, and litigation would be infinite. Russ. Arb. 201; *Emery* v. *Wase*, 5 Ves. 548. [WILLES J. mentioned *Anderson* v. *Wallace*, 3 Cl. & Fin. 26, as deciding, that under an authority to arbitrators to call in a competent person to assist them in the valuation of the stock and property of a partnership, it is no objection to their award that they have availed themselves of the assistance of such person in deciding on the partnership accounts; and that the arbitrators, in adopting, in terms, the opinions of such person, do not constitute him an umpire, but make his opinions their own; and the award cannot be impeached on that account.] In *Eads* v. *Williams* the arbitrator adopted the opinion contrary to his own conviction; that is not so here. (Note 3 to *Veale* v. *Warner*, 1 Wms. Saund. 327; *Willes* v. *M'Cormick*, 2 Wils. 37; *Braddick* v. *Thompson*, 8 East, 344.) [WILLES J.—There is a considerable difference between the facts stated in the court below and in the case before us here. WILLIAMS J. cited *Little* v. *Newton*, 2 Man. & G. 351.] *Wade* v. *Dowling*, 18 Jur. 728, relied on by the other side, has no bearing on this case.

Gray (*Field* with him), contra.—The objection is, that the arbitrators, in fact, have made Rotton the arbitrator in the cause. The parties never agreed that Rotton should be arbitrator between them; they only gave a power of consulting him in case of difficulty. If the case had been referred to a member of the bar, could he have said, "I have too much business to attend to it; I will hand it over to a friend, and will sign, as my award, the opinion he may write on it"? It makes no difference that Rotton's opinion refers only to part of the items; for the question is, whether this is the award that the parties impliedly stipulated for? I say, it clearly is not. It is clear that Rotton thought he was deciding the matter, and that the arbitrators considered that this opinion of his was a decision of the cause. In *Anderson* v. *Wallace* the arbitrator had authority to call in the valuer; and we do not dispute the principle of the case. The judgment of Lord Cranworth in *Eads* v. *Williams* is much in point. [CROMPTON J.—Could these facts be evidence on nul tiel agard? Could bribery of the arbitrator be evidence on that issue?] In *Wade* v. *Dowling* (as reported in 23 L. J., Q. B. 302), ERLE J. says, "The mental act is the award." [He also cited Buller's Plead. 288; *Fisher* v. *Plumley*, 11 East. 188; *Draper* v. *Stansfield*,

14 M. & W. 822; *Armitage* v. *Coates*, 4 Exch. 643; and *Roberts* v. *Eberhardt*, 4 Jur., N. S., 113.]

Dowdeswell, in reply, cited *Adcock* v. *Wood*, 6 Exch. 814; S. C., in error, 7 Exch. 468. [CROMPTON J.—Is it essential that the arbitrator's mind must go with the award to make it a valid award?]

Cur. adv. vult.

Dec. 2.—WILLES J. now delivered the judgment of the court.—After stating the pleadings, &c., as above, the learned judge proceeded:—The plaintiff has appealed from that decision. The case was ably argued on Saturday last by Mr. Dowdeswell, for the plaintiff, and Mr. Gray, for the defendant. The court took time to consider; and we are now all of opinion that the rule to enter a verdict for the plaintiff ought to be made absolute. Whether the award was subject to be set aside for misconduct of the arbitrators by an application to the court, of which the submission might be made a rule (12 & 13 Vict. c. 106, § 154), depends upon the question of fact, whether, in acting upon Rotton's opinion, they did more than the parties themselves had consented to. See *Anderson* v. *Wallace*. And upon that question we need not pronounce any opinion; because, assuming that it ought to be answered in the affirmative, the question still remains to be considered, whether the objection can be raised by plea; and we are of opinion that it cannot. The award was made upon all the matters in difference referred, and no more. It was made in the requisite form, and it was intended by the arbitrators to express their decision, adopting the opinion of Rotton. It was, therefore, such an award as the declaration alleged, and the plea of no such award is negatived by the facts. In truth, this objection, assuming it to be well founded, is one of a sort which ought to be brought forward whilst the matter is fresh, in the manner and within the period prescribed by the stat. 9 & 10 Will. 3, c. 15, in cases which fall within its provisions, or by the practice of the courts in other cases within their summary jurisdiction—a jurisdiction now extending over a large number of cases which formerly belonged exclusively to the Court of Chancery. See Com. Dig. tit. Arbitrament, A., and *Nichols* v. *Roe*, 3 My. & K. 431. The importance of maintaining this distinction will be obvious when it is considered that, upon an application to the equitable jurisdiction of the court, a person who had

taken a benefit under the award could not be heard to object —at least not without giving up the benefit—that upon such an application the alleged defect of this award might be cured by abandoning the peccant items, or that the court might, in its discretion, send back the matter for re-consideration by the arbitrators; whilst upon plea the award must be held good or bad simpliciter, without regard to any of those equitable considerations. The judgment must, therefore, be reversed, and a verdict entered for the plaintiff.

Judgment reversed.

Court of Exchequer. — Hilary Term.

ANCONA *v.* MARKS. — Jan. 11 and 13, 1862.

Principal and agent — Omnis ratihabitio — Indorsement of bill of exchange—Ratification after action brought.

The holder of a bill of exchange, &c. having indorsed and delivered it to a third party, who receives it on behalf of C. without his knowledge, and without his knowledge sues upon it in his name, C. can, *pendente lite*, by his ratification, make good both the indorsement and the litigation up to the moment of the ratification.

Per MARTIN and CHANNELL BB. — This state of the law is not satisfactory.

The first count of the declaration stated that the defendant, by his cheque or order, directed to Messrs. Attwood & Co., required them to pay to bearer 100*l.*; and the plaintiff became the bearer of the said cheque, whereof the defendant had notice, and the defendant dispensed with presentment thereof, and the same was not presented, at the defendant's request, and the said Messrs. Attwood & Co. did not pay the same, whereof the defendant had notice, but did not pay the same. Second count, that the defendant, by a promissory note payable to his own order, promised to pay 75*l.*; and the defendant indorsed the same to one Herbert Wright, and the said Herbert Wright indorsed the same to the plaintiff, and the defendant did not pay the same. Third count on another promissory note. Fourth count, that Herbert Wright, by his bill of exchange, addressed to the defendant, required the defendant to pay 100*l.* three months after date, and the defendant accepted the same, and indorsed the same to Herbert Wright, and Herbert Wright indorsed the same to the plaintiff; but the defendant did not pay the same. Pleas— first, to the first count, that the plaintiff was not the bearer

of the said cheque; secondly, to the same, that the defendant did not dispense as alleged; thirdly, that the defendant had not notice as alleged; fourthly, to the second count, that the said Herbert Wright did not indorse as alleged; fifthly, to the same, that the plaintiff was not the holder of the said note; sixthly, seventhly, eighthly, and ninthly, similar pleas to the third and fourth counts. Issue on the pleas. The cause was tried in London, after Trinity Term, before Martin B. It appeared that the plaintiff was an auctioneer in London, and that the defendant was a cabinet maker in the same place. The defendant was indebted to Mr. Herbert Wright, an attorney at Birmingham, for money lent and for professional services. On this account bills of exchange were given by the defendant on the 9th, 10th, and 13th December. The cheque and other securities were given about the same time. Subsequently Wright handed these instruments to Greville & Tucker, attorneys, telling them that he wished an action to be brought upon them in Ancona's name. Mr. Wright had, on a prior occasion, desired the firm to provide him with a nominal plaintiff, for the purpose of suing on a bill of exchange accepted by the defendant; and Mr. Tucker had permitted Ancona's name to be used, the action being brought in his name. On the present occasion the bill of exchange and the cheque were indorsed, and delivered to Mr. Tucker, in Ancona's name. Mr. Tucker stated that he had a general authority from Ancona to use his name for such purposes, and that he had since ratified the indorsement, but that the instruments remained in his own hands. The plaintiff was himself called, and stated that on one previous occasion his name had been used in a similar way, but that he had no knowledge of its being used in the present case until after the action had been brought; but that, on learning what had been done, he sanctioned and adopted the whole transaction. The defendant's counsel thereupon submitted that the plaintiff had not offered evidence in proof of any of the issues except the second and third, and that the defendant was entitled to a nonsuit; but the jury, under the direction of the learned judge, returned a verdict for the plaintiff for the full amount. In Michaelmas Term,

Hawkins obtained a rule calling upon the defendant to show cause why the verdict should not be set aside, and a new trial had, on the ground that the learned judge had therein misdirected the jury, and that the verdict was against

the evidence on all the issues except the second and third. Against this rule,

Collier and *Macnamara* showed cause.—They cited *Emmett* v. *Tottenham*, 8 Exch. 884; *Sainsbury* v. *Parkinson*, 18 Law T. 198; *Lysaght* v. *Bryant*, 19 L. J., C. P., 160; *Law* v. *Parnell*, 7 C. B., N. S., 282; *Jenkins v. Tongue*, 29 L. J., C. P., 147; *Richardson* v. *The Countess of Oxford*, 2 F. & F. 449; and *Hull* v. *Pickersgill*, 1 B. & B. 282.

Hawkins and *T. Atkinson*, contra, in support of the rule, contended that the learned judge was not justified in directing the jury as he did, and that the evidence did not support the finding of the issues in question in favor of the plaintiff. [They cited *Lloyd* v. *Howard*, 15 Q. B. 995; *Wilson* v. *Tumman*, 6 Man. & G. 231; and *Doe* v. *Walters*, 10 B. & Cr. 626.] The facts of the case do not show that possession was really given to the plaintiff. The securities did not pass into his hands as a matter of fact; and as for their being in his possession constructively, it never was the intention of any of the parties to the transaction that he should derive any benefit from them, exercise any control over them, or be connected with them in any way. The declaration of Greville & Tucker, that they took the securities on Ancona's behalf, being made with a different object, cannot be allowed to color the transaction. In order to make the proceedings valid, there must be validity imparted to a complicated twofold transaction—first, the indorsement to a man who has no interest in the bill; and, secondly, the writ and subsequent proceedings taken upon the virtue of the validity of that indorsement. Both these acts it is proposed to ratify by the declaration of the nominal plaintiff during the trial. To do so would be to facilitate an abuse of the process of the court. Story on Agency, 304, § 240, 4th ed., distinguishes between the acts of an agent which are voidable, and those which are entirely void. The former only, he says, admit of ratification by the principal; and it is submitted that the facts here in question are to be ranked among the latter.

Pollock C. B.—I am of opinion that this rule should be discharged. We may take it to be the fact, that Ancona knew nothing of the manner in which his name had been used when the action was commenced; but the question is, whether, these securities having been delivered to Tucker, who had formerly been engaged in similar transactions, on behalf of Ancona, with his consent, and there being an indorsement

and delivery to Tucker, as for Ancona, with the view of enabling Ancona to become the plaintiff, Ancona's consenting and ratifying such indorsement is sufficient to make the indorsement to Tucker an indorsement to him. Now, I am of opinion that it is a full ratification, and I think it makes no difference whether the ratification was before the plea was pleaded or after. The case of *Sainsbury* v. *Parkinson*, which has been referred to in the argument, has some bearing on the present, for I gave the defendant's counsel leave to move on the question of an indorsement having been made, and he did not avail himself of it. But the marginal note in the report referred to is certainly too strong; and if I said what I am reported to have said, I went too far. A manual delivery to the indorsee is clearly not essential, for a delivery to a clerk or any proper agent would be equally valid. It appears from the notes of the evidence taken at the trial, which are in my possession, that it was not the intention of the parties that there should be a real indorsement to Sainsbury at all, and that was the ground of my giving leave to move. I think that the doctrine Omnis ratihabitio retrotrahitur applies, and that the plea has not been sustained. Therefore, in every view of the question, the rule must be discharged.

Channell B.—I also am of opinion that the rule should be discharged, though I should not be sorry if, consistently with the rules of law, it could be made absolute. But we are not at liberty to do so. Some points have been raised in the course of the argument on which it is not necessary to give any opinion, and on which I do not intend to pronounce one. But the grounds on which I found my judgment are short — was the plaintiff, at the time of the action brought, the holder of the bills according to the evidence? It is not necessary that he should have been the owner, so as to have the right to retain the bills against any other owner, but it is enough if he be the holder with an interest in the bills in his possession. Now, Ancona was not the actual holder; he had no knowledge of the transfer. Wright was the owner, and the question to be asked is, did he consent, as far as he could, that Greville & Tucker should hold the bills on behalf of Ancona? This is clear in favor of the plaintiff. He delivered the bills to them for that very purpose. Greville & Tucker had acted previously in the same manner. In the present case they had no express authority, but they did receive on behalf of Ancona. It was intended by Wright

that they should do so, and they did so. They had no previous authority from Ancona for doing so, but it was subsequently supplied. The proof of this places Ancona in the light of a constructive holder of the bills, who, by the ratification given to the bringing of the action, was able to justify its being brought in his name.

WILDE B.—I am of the same opinion. The only difficulty I had was regarding the facts; but I now see distinctly that the bills were handed by Wright, the real owner, to Greville & Tucker, on behalf of Ancona, Wright well knowing that they professed to act on behalf of Ancona. A previous authority from Ancona would certainly have enabled them to sue in his name. The question is, whether a subsequent authority will supply the place of a prior authority, and whether Greville & Tucker, in suing in Ancona's name, did such an act as he could have done, and could afterwards ratify. A mere consent that an action may be brought upon a bill does not make the party consenting the holder. That is the point decided in *Gill* v. *The Earl of Chesterfield*, 8 Exch. 884; and as I understand the ruling in the case of *Sainsbury* v. *Parkinson*, it is not sufficient to constitute a man the holder of a bill of exchange that it should be indorsed and delivered to his attorneys. But the evidence here proves that the real owner handed the bills to persons who took them as the agents of Ancona. In their place Ancona could have sued. Is, then, his ratification sufficient to give him the same right? The ratification is large enough, in fact, but it is said that it cannot make him the owner at the time. I find no principle enunciated so as to limit the doctrine of ratification in this manner. In *Wilson* v. *Tumman*, it is laid down — "That an act done for another by a person not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the well-known and well-established rule of law." In that case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent as by, and with all the consequences which follow from, the same act done by his previous authority. See the Year Book, 7 Hen. 4, fol. 24. Ancona, therefore, is in the same position, having ratified what Greville & Tucker did, as though he had done himself what they did on his behalf.

MARTIN B.—I am of the same opinion, and, like my Brother CHANNELL, I should be well pleased if the law were otherwise, and the right to sue on bills of exchange were restricted to those who possess a real interest in the instrument. The declaration contains counts on a check payable to bearer, which may be transferred from the original holder to any other person, and the transferee acquires the right of suing upon it, on promissory notes, and on a bill of exchange generally indorsed. The same law applies to all these instruments; the right of the holder is the same in each case; any person who is in possession of any of them has the right to sue. This state of the law, whether it be desirable or not, as it stands at present, is binding upon us; possession is the test of the right to maintain an action. On the facts in this case I find that Wright, the owner of the instruments, handed them to Greville & Tucker, on behalf of Ancona, and they received them for him, and sued on them in his name. On these facts, in addition to what has been said by my Brother WILDE, I must observe that it is stated in the notes to *Armory* v. *Delamirie*, 1 Smith's L. C. 301, 5th ed., — "On similar reasoning seems to rest the well-known doctrine, that a subsequent ratification is tantamount to a prior command of an act done in the name of the party who ratifies; so that where a person, if present at the time, could lawfully command any act to be done, any other person, though either wholly without authority, or exceeding the limits of his authority, would be justified in doing that act, provided he did it in the name, or as one acting by the authority, of the person entitled (whether to his advantage or not), and obtained his subsequent ratification. The case of *Doe* v. *Walters*, which was cited on the other side, was a case of a subsequent ratification of a notice to quit given by the landlord to the act of his agent. The case may be explained by a reference to the rights of third parties, which might be compromised by the unauthorized act of the agent. But in any case the general principle is too well established to be open to question in the present case.— *Rule discharged.*

Hawkins, on a subsequent day, applied for leave to appeal; but the Court, after taking time to consider, refused to grant it.

Court of Exchequer.

SHEEN *v.* BUMSTED.—May 12, 1862.

Evidence — Fraudulent representation — Question as to belief or repute.

In an action for a false represention, that a third party, to the best of his knowledge, was responsible, the defendant may be asked in chief whether, at the time of the representation, he believed the debtor to be in good credit, and other persons residing in the neighborhood may be asked a similar question.

Action for a false representation. The declaration alleged that the defendant falsely and fraudulently represented to the plaintiff that one Watson, to the best of his knowledge, was trustworthy, whereas, in truth, as the defendant well knew, he was not so.

Plea, not guilty.

At the trial before Martin B., at the last Norfolk Assizes, it appeared that one Watson, a grocer, at ——, had written to the plaintiff at Leicester, offering to purchase some goods of him, and referring him to certain persons, one Taylor and others, including the defendant. The plaintiff applied to the defendant, who thereupon wrote a letter which contained the representation relied on, and ran thus :—"To the best of my knowledge Watson is trustworthy, I having known him in business for fourteen years, and he doing business with London houses I do business with." The plaintiff did dot reply to these houses, nor to the other persons referred to, but forthwith supplied the goods to Watson. Soon afterwards Watson became bankrupt, and it transpired, in the course of the proceedings in bankruptcy, that the defendant had bought goods of him 25 per cent. under the prime cost. This was the main point in the case for the plaintiff, so far as regarded the proof of a false and fraudulent representation. To disprove it, the defendant was called, and asked whether, at the time of his letter, the debtor was in good credit to the best of his belief. This was objected to on the part of the plaintiff, but the learned baron admitted the question. One Adams, the foreman of the defendant, and who had managed the business dealings which had taken place between the defendant and the debtor, was also called, and asked a similar question, which likewise was objected to and allowed. And one or two other witnesses for the defendant were also asked what, at the time

in question, they had believed to be the credit or repute of the debtor.

O'Malley Q. C., for the plaintiff, had obtained a rule to set aside a verdict for the defendant, on the ground of the improper reception of the evidence.

Bulwer and *Cherry* showed cause, on the part of the defendant.—The evidence was admissible, for it was relevant to the issue, which, upon the plea of not guilty, was whether the defendant had been guilty of the wrongful act imputed to him, *i.e.*, a fraudulent representation that the debtor was solvent, while knowing him to be not so. The evidence went directly to that point; and any evidence tending to show that the representation was honest and *bona fide*, would rebut the alleged fraud, and go to defeat the action; and therefore would be relevant: *Shrewsbury* v. *Blount*, 2 M. & G. 475. And as credit is a thing of repute, the only way of proving it is by evidence of the debtor's repute among his neighbors, of whom the defendant was one. What he believed, therefore, and what they believed would be equally admissible, being merely different means of proving the same fact — viz., his *bona fides*. The question is, what was in the mind of the defendant at the time of the representation.

O'Malley Q. C. and *Keane*, for the plaintiff, in support of the rule.—If any or either of the questions was inadmissible, there must be a new trial; and the questions to the third parties clearly were so, for they went to the mere belief of strangers, not proved to have been brought home to the defendant. Belief is different from knowledge, and men may believe without any real means of knowledge. The question being, what was in the mind of the defendant, what can it matter what other persons believed, unknown to him? [MARTIN B.—It surely might be one mode of showing his knowledge; as showing a knowledge or repute, common to him and his neighbors.] No authority can be cited for such a species of evidence, and it is contrary to principle. No doubt, evidence is admissible to prove or disprove actual malice, and anything brought home to the mind of the defendant might be admissible to prove or disprove fraud. But the mere belief of third persons is not admissible in either class of cases. It would be dangerous if it were so; and if an action for malicious prosecution, for instance, could be defended on the belief of strangers that the charge was true.

Cur. adv. vult.

In Trinity Term, the judges differing in opinion,[1] the following judgments were delivered:—

Bramwell B.—I think the questions were not admissible. They were not relevant to the issue, which was, whether the debtor was untrustworthy to the knowledge of the defendant. It was said that they were admissible questions, because the knowledge of those who resided in the same neighborhood might be deemed to be his knowledge. But the question was not as to the knowledge, but as to the belief of the witnesses. The proper question was, what was the belief of the defendant at the time he wrote the letter. The grounds of his belief could be gone into on cross-examination. To me it appears that the question is of great importance in point of principle. It may be that twenty persons had a good opinion of the debtor's credit, but that the defendant did not know it of any of them, and himself knew the contrary.

Martin B.—The defendant's representation was that, to the best of his belief, Watson, the debtor, was trustworthy; and his shopman, who had managed the transactions with him, was asked whether on the 24th of October Watson, in his belief, was trustworthy; and four tradesmen who had had dealings with Watson were asked a similar question. The point is, whether these questions were admissible. I think they were. It was objected that it was irrelevant, because the plaintiff had relied on the knowledge possessed by the defendant personally as to the position of the debtor, and that, therefore, it was not material what was the knowledge or belief of others. But the admissibility of evidence depends on the issue, which was, whether the defendant had fraudulently stated that the debtor was trustworthy. The rule of law is that all facts and circumstances which afford a fair presumption or inference as to the question in dispute, and may fairly influence the judgment of the jury, are admissible. Suppose the debtor had been, to the knowledge of those in the neighborhood, of bad credit, would it not have been evidence against the defendant? I think it would; for it would have been evidence of knowledge and belief from which the knowledge and belief of the defendant might have been fairly inferred. If admissible against the defendant, surely it is evidence admissible in his favor. No doubt it is not conclusive. It might be that the defendant had knowledge which the others

[1] Wilde B. was absent and took no part in the judgment.

had not. But still it was evidence fit and proper to be laid before a jury; and before the parties to a cause could be called as witnesses, it was often the only evidence the defendant in such actions could adduce. It was not evidence as to the opinion of others—it was evidence of a fact that the debtor, at the time in question, was considered trustworthy. As to the defendant's shopman, he was cognizant of all the transactions between the defendant and the debtor, from which the defendant's knowledge was said to have been derived, and he had, therefore, the same means of knowledge as the defendant. No objection could be taken to the defendant's giving evidence that to his knowledge and belief the debtor was trustworthy; and, in my opinion, to have rejected the evidence would have been to shut out fair and proper means of arriving at the truth.

POLLOCK C. B. — The main question in the cause was whether the debtor Watson was, at the time of the defendant's representation, trustworthy in defendant's belief. Trustworthy, in that sense, did not mean merely as a fact his being able to pay his debts, but it meant, in a word, credit. Therefore the question to be tried in substance and effect was whether, in the defendant's belief, Watson was in good credit at the time. I think, therefore, that the questions were admissible, even on my brother BRAMWELL'S view, and the fallacy lies in confounding fact with opinion. A witness may surely be asked his opinion, when it is really the whole question between the parties. Agreeing, as I do, that the questions were rightly admitted, the judgment is that the rule be discharged.

Rule discharged.[1]

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[1] Notice of appeal was given.

Exchequer Chamber.

CAHILL *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY. — Feb. 6, 1862.

Coram. — COCKBURN C. J., POLLOCK C. B., WIGHTMAN and CROMPTON JJ., CHANNELL and WILDE BB.

Railway company—Passengers' luggage—Merchandize.

Where a railway company contracts with passengers for certain hire to carry them with their personal luggage only, and a passenger is conveyed, with a box, which he has with him as personal luggage, but which is, in fact, merchandise, the company are not liable for its loss, unless the package is unmistakably merchandise.

Judgment of the Common Pleas affirmed.

Appeal from the decision of the Common Pleas.

The case in the court below is reported 10 C. B., N. S., 154, 9 W. R. 653. The special case, stating the facts in detail, is there set out.

The short point now argued in appeal from the court below was on the following facts:—Plaintiff presented himself at the defendants' railway station for conveyance as a passenger, having with him a package in the form of a box covered with a black leather case and with the word "glass" written outside in white letters. The defendants undertook to convey plaintiff by the usual contract. The package was lost; and in an action for its loss defendants pleaded that it was not in fact personal luggage, but plaintiff contended that the nature of the package being obviously declared, defendants had undertaken to carry it safely.

Beaseley, for the appellant, contended that the facts showed that any reasonable person must have inferred the contents of the package to be merchandize and not personal luggage from the appearance of the box, and especially from the word "glass" being written outside; and that, having failed to make inquiries, and not having objected to take the goods, they were bound to carry them securely. He cited *The Great Northern Railway Co.* v. *Shepherd*, 8 Ex. 30, 38; *Walker* v. *Jackson*, 10 M. & W. 161.

Welsby, contra, was not not called on.

COCKBURN C. J.—I am of opinion that the judgment of the court below should be affirmed. I am far from saying, that if a Railway Company choose to allow passengers to take, under

such circumstances as these, as personal luggage that which they know to be merchandize, it lies in their mouths to assert that the goods are not personal luggage, and so be exempted from liability for their loss. But if, on the other hand, a passenger takes with him as luggage goods which are in fact merchandize, without paying freight as for merchandize, and no notice being given by him to the Railway Company of their being merchandize, then another question arises. Here the question is, whether or no there was to be reasonably inferred a knowledge in the company that the goods were really merchandize. It is said by Lord WENSLEYDALE, in 8 Ex. 38, in conformity with the view I now hold, that "if the plaintiff had carried these articles exposed, or had packed them in the shape of merchandize, so that the company might have known what they were, and they had chosen to treat them as personal luggage, and carry them without demanding any extra remuneration, they would have been responsible for their loss." And here, if the company must have known their nature, they would perhaps be liable; but not so, if no such knowledge could be reasonably inferred. The question thus arises, do the facts show that there was knowledge in the company's servants that the luggage was merchandize; and I think the facts do not show such knowledge. It is true, the package, though marked as "glass," and being of a curious form, was in fact taken as luggage; probably, however, the company's porter never thought about it at all, but shipped it as luggage as a matter of course; and I think the facts are not sufficient to make us suppose that the company's servants knew the nature of the goods.

The rest of the court concurred.

Judgment affirmed.

LEGAL NOTES.

In a recent case in the House of Lords, it was said that *Medway* v. *Needham*, 16 Mass. 157 (1819), as an American case, cannot be followed or treated as sound law.[1]

[1] Brook *v.* Brook, 9 W. R. 461, 464 (1861). In Massachusetts it has been repeatedly affirmed. Putnam *v.* Putnam, 8 Pick. 434. Sutton *v.* Warren, 10 Met. 452. Commonwealth *v.* Hunt, 4 Cush. 50. See Gen. Stat., c. 106, § 6.

Sutton v. *Warren*, 10 Met. 451 (1845). An American decision on the law of marriage, but the decision proceeded in a total misapprehension of the law of England.[1]

In *Richmond* v. *Smith*, 8 B. & C. 9, BAYLEY J. said: "An innkeeper's liability very closely resembles that of a carrier. He is primâ facie liable for any loss not occasioned by the act of God or the King's enemies, although he may be exonerated when the guest chooses to have his goods under his own care." WILDE B.: "That is a mere dictum, not necessary for the decision of the case."[2] But WILDE J. says: "Innkeepers as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property."[3]

Bush v. *Steinman*, 1 B. & P. 404. In *Reedie* v. *London & North Western Railway Company*,[4] ROLFE B., in delivering the judgment of the court, said that "according to modern decisions, *Bush* v. *Steinman* must be taken not to be law, or, at all events, that it cannot be supported on the ground on which the judgment of the court proceeded."[5]

In a very recent case, BLACKBURN J. remarked that "the Modern Reports are a very loose compilation."[6]

In *Small* v. *Nairne*, 13 Q. B. 844, LORD DENMAN said: "I am tempted to remark for the benefit of the profession, that Espinasse's Reports, in days nearer their own time, when their want of accuracy was better known than it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke's Reports." This remark is quoted by COLERIDGE J. in *Wenman* v. *Mackenzie*, 5 E. & B. 453.

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[1] Lord CAMPBELL C. in Brook *v.* Brook, 9 W. R. 461, 464; 4 L. T. N. S. 93.

[2] Morgan *v.* Rarey, 6 H. & N. 272.

[3] Mason *v.* Thompson, 9 Pick. 284.

[4] 4 Exch. 244.

[5] POLLOCK C. B. in MacCarthy *v.* Young, 6 H. & N, 329, 333; 30 L. J. Exch. 227, 229. See also Hilliard *v.* Richardson, 3 Gray, 362, 363.

[6] Regina *v.* Allen, 8 Jurist, N. S. 231.

Such was Bracton's authority, that Staundford's Pleas of the Crown, written in the 16th century, are little more than an annotated Bracton, with later statutes and cases, as a lawyer would now say, "entered up."

Before the Revolution of 1688, no one of the present rules of evidence was well established, except, perhaps, that which excludes hearsay evidence.[1] It was recognized by Jeffreys in Lord W. Russell's trial.[2] It is the only rule of evidence referred to in the instructions drawn up for the use of Algernon Sydney, by Sir W. Williams.[3] It was also laid down vaguely in the case of Mary Moders, tried for bigamy in 1663.[4]

The rule requiring the production of the best evidence is very technical, and often operates very harshly. For example, matters of record can only be proved by the production of the record. In the Cambridge Prize Essays 1857, p. 30, the following case is related. A man was tried for procuring abortion, and was acquitted. The judge did not agree with the verdict, and directed him to be re-committed, and indicted at the next assizes for murder, the woman having died. He was accordingly indicted, and pleaded autrefois acquit; but as he was a poor man, and was not able to instruct counsel before the assizes began, he had not been advised to procure the piece of parchment technically called the record; and though his counsel offered to call the clerk of assize who had taken the former verdict, and to produce the memorandum made by him officially at the trial — of which memorandum the record itself was only a transcript — this evidence was excluded, and the man was capitally convicted, and transported for life.[5]

No doubt the non-production of an original document may, under particular circumstances, be very suspicious; but whether it is so in the particular case or not, would seem to be a question rather for a jury than for the court.

There are very many cases of murder more venial than many cases of manslaughter. A. slaps B. in the face, B.

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[1] Lord CAMPBELL C. J. in Regina *v.* Scaife, 2 Denison, 283; WILDE J. in Cooley *v.* Norton, 4 Cush. 95

[2] 9 S. T. 619. [3] 9 S. T. 826. [4] 6 S. T. 276.

[5] In this particular case, the plea could not have been supported if the record had been produced.

stabs him; this is manslaughter. A. shoots at a fowl, intending to steal it; one grain of shot hits B. who dies of lock-jaw a month after; this is murder. The fowl, instead of a hen, is a wild partridge; it is manslaughter. A., B., C., D., and E. are stealing apples; F., the owner of the tree, collars A., who resists. B., C., D., and E. throw stones at him, and the stone thrown by D. kills him; this is murder in all five. A. has reason to think that B. has seduced his wife; runs home, finds some evidence (though not conclusive evidence) of the fact, and stabs B.; this (per WATSON B., *Regina* v. *Davies*, Liverpool Summer Assizes, 1857,) is "manslaughter of the lowest degree."

In Lord CAMPBELL'S Lives of the Chancellors, the following passage occurs in the account of the trial of Sir Thomas More:—"The jury, biased as they were, seeing that if they credited all the evidence, there was not the shadow of a case against the prisoner, were about to acquit him; the judges were in dismay; the attorney-general stood aghast; when Mr. Solicitor, to his eternal disgrace, and to the eternal disgrace of the court who permitted such an outrage on decency, left the bar, and presented himself as a witness for the crown. Being sworn, he detailed the confidential conversation he had had with the prisoner in the Tower, on the occasion of the removal of the books."[1]

The distinction between local and transitory offences is not very clearly drawn, but in the former category may be safely included, among others, burglary, but not highway-robbery; house-breaking; stealing in a dwelling-house; sacrilege; riotously demolishing churches, houses, machinery, &c.; maliciously firing a dwelling-house, perhaps an out-house, but not a stack; forcible entry; poaching; nuisances to highways; malicious injuries to sea-banks, mill-dams, or other local property. It would be extremely difficult to advance any sensible argument in favor of this dictinction which the law recognizes between local and transitory offences. On an indictment, indeed, against a parish for not repairing a highway, it may be convenient to allege, as it will be necessary to prove, that the spot out of repair is within the parish charged; and in those very few cases, where the statute upon which an

[1] Vol. I. p. 580, 581, quoted in 1 Cush. 520, note.

indictment is framed, gives the penalty to the poor of the parish in which the offence is committed, a similar allegation may be properly inserted; but why a burglar should be entitled to more accurate information respecting the house he is charged with having entered, than the highway robber can claim as to the spot where his offence is stated to have been committed, it is impossible to say; either full information should be given in all cases or in none.[1]

A charge of stealing property which is part of the realty, as earth, or standing timber, which merely imputes a trespass, is not actionable. This doctrine has long been the subject of criticism, as appears from the following passage from Hobbes's Dialogue between a Lawyer and a Philosopher.

"*Philosopher*.—I have heard that if a man slander another with stealing of a tree standing, there lies no action for it, and that upon this ground, viz., because to steal a standing tree is impossible, and that the cause of impossibility is, that a man's freehold cannot be stolen; which is a very obvious fallacy; for freehold signifieth not only the tenement but also the tenure; and though it be true that a tenure cannot be stolen, yet every man sees that standing trees and corn may be easily stolen; and so far forth also they are personal goods; for whatsoever is freehold is inheritance, and descendeth to the heir, and nothing can descend to the executor but what is merely personal. And though a box or case of evidences are to descend to the heir, yet unless you can show me positive law to the contrary, they shall be taken into the executor's hands to be delivered to the heir. Besides, how unconscionable a thing is it, that he that steals a shilling's worth of wood which the wind hath blown down, or which lieth rotten on the ground, should be hanged for it, and he that takes a tree worth twenty or forty shillings should answer only for the damages?

"*Lawyer*.—'Tis somewhat hard, but it has been so practised time out of mind."

Let us consider the reason of the thing. For nothing is law that is not reason.[2]

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[1] 1 Taylor Ev. 3d ed. § 227, 228.

[2] POWELL J., in Coggs *v.* Bernard, 2 Ld. Raym. 911.

Lord DENMAN C. J. delivering judgment in the House of Lords, in a well-known case, took occasion to remark, that a large portion of the *legal opinion* which has passed current for law falls within the description of "law taken for granted;" and that, "when, in the pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law, unless it can be traced to some competent authority, and if it be irreconcileable to some clear legal principle."[1]

The constant publication of cases in support of clear law is excessively tiresome, and irresistibly calls to mind the amusing colloquy in *Much Ado About Nothing*.

Don Pedro.—I think this is your daughter.

Leonato.—Her mother hath *many* times told me so.

Benedick.—Were you in doubt, sir, that you asked her so often?

NOTICES OF NEW PUBLICATIONS.

A TREATISE ON THE LAW OF SUBROGATION, with full references to the Civil Law. By S. F. DIXON. Philadelphia: George W. Childs. 1862. 1 vol. 8vo. pp. 188.

In tracing the doctrine of subrogation to its original source in the Roman law, the design in this treatise has been to compare the principles of the Roman jurisprudence on that subject with the rules applied to subrogation at the common law, and more especially with the law as understood and administered in the United States. The author has treated the subject with clearness and accuracy. As to the doctrine, that on payment the surety becomes subrogated by operation of law, the author states the rule as recognized in Massachusetts, that a co-debtor who makes payment of a debt in which others are bound with him for payment, thereby extinguishes the security, leaving the party who makes payment to his remedy at law by an independent action; and cites *Hammatt* v. *Wyman*, 9 Mass. 138; *Brackett* v. *Winslow*, 17 Mass. 153; and *Bowditch* v. *Green*, 3 Met. 360. But he omits the case of *Adams* v. *Drake*, 11 Cush. 504, in which the principle of those cases is affirmed, and the law distinctly stated by Mr. Justice DEWEY.

[1] O'Connell *v.* Regina, edited by Leahy, p. 28. And see per POLLOCK C. B. 2 H. & N. 139.

THE MASSACHUSETTS DIGEST; Being a Digest of the Decisions of the Supreme Judicial Court of Massachusetts, from the year 1804 to the year 1857. By EDMUND H. BENNETT and FRANKLIN F. HEARD. Volume I. A—H. pp. 778. Boston: Little, Brown and Company. 1862.

This Digest embraces the decisions from the first volume of Massachusetts Reports to the eighth volume of Gray, inclusive, together with some early cases from Dane's Abridgment, and a few decisions not contained in the published Reports. The original design was to include all the decisions down to the time of going to press, but the double hiatus now existing in the series of Reports in this Commonwealth, and the practical impossibility of obtaining complete and reliable abstracts of so many unpublished cases, compelled the authors either to terminate the Digest at the last volume published in regular order, or to postpone the publication of the same until the appearance of the remaining six volumes of Mr. Gray's series. As that time was uncertain, the former course seemed the least objectionable, and the Digest ends with the eighth of Gray. Reference has, however, generally been made to such cases in the volumes after the eighth of Gray, as have a material bearing upon any former decisions.

We most heartily commend this Digest to the profession. The names of its authors are of themselves a guaranty that the work is done thoroughly and well. A careful examination of this volume shows that the cases are admirably digested, and that the matter of the several titles is so arranged in divisions and sub-divisions, as most materially to aid in the search for authorities. We call it a "Model Digest." Z.

THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURT OF CHANCERY; With an Essay on the Terms Heir, Heirs, Heirs of the Body. By TAPPING REEVE. Third Edition, with Notes and References to English and American Cases. By AMASA J. PARKER and CHARLES E. BALDWIN. Albany: William Gould. 1862. 8vo. pp. 677.

It was the design of the author of this book, to exhibit the common law of England and such of the English statutes as have been adopted in this country. A similar plan was followed by Judge GOULD in his treatise on the law of Pleading. And for this reason, if for none other, both of these standard works will ever be of the greatest value to the student and the practitioner, notwithstanding the changes which are constantly being made by the legislatures of the different States, in the branches of the law of which they respectively treat.

It has been the object of the editors, in preparing the present edition, to furnish ample references to American statutes and decisions, "so that the work shall present the condition of the law as it now exists in this country." And they have faithfully performed their task. The notes are in keeping with the text, and are concisely and accurately written. As a text-book on the law of the Domestic Relations, it is unsurpassed.

ARCHBOLD'S PLEADING AND EVIDENCE IN CRIMINAL CASES; With the Statutes, Precedents of Indictments, &c., and the Evidence Necessary to Support them. By JOHN JERVIS, Esq. The Fifteenth Edition, including the Practice in Criminal Proceedings by Indictment. By W. N. WELSBY, Esq. London: Henry Sweet; Stevens, Sons & Haynes. 1862. Royal 12mo. pp. 883.

The passage of the Criminal Statutes Consolidation Acts, 24 & 25 Vict. cc. 94-100, rendered necessary a new edition of this well-known work. By

these statutes the only crimes now punishable with death are treason, murder, and piracy accompanied with wounding or attempt to murder. Enactments which were scattered over more than a hundred acts of Parliament are now comprised in six, which are framed with more precision of legal language than had generally been employed in statutes relating to the criminal law. This edition is prepared with that degree of conciseness and accuracy which Mr. Welsby's high reputation would lead us to expect.

ARUNDINES CAMI sive Musarum Cantabrigiensium Lusus Canori. Collegit atque edidit HENRICUS DRURY, A. M. Editio Quinta. Cantabrigiæ. 1860. 8vo. pp. 388.

This beautifully printed volume is one of the most entertaining of the recent issues of the English press. It consists of Greek and Latin translations, chiefly from the English poets, most of which are translated with exquisite skill. Among the contributors to its pages are some of the best scholars of the University of Cambridge. Many of the productions of Gammer Gurton are rendered into the languages of Greece and Rome. No less a personage than the great Porson has tranlated into Greek her "Three Children Sliding on the Ice." We give her celebrated "Jack Horner" as a specimen:

LITTLE JACK HORNER.

Little Jack Horner
Sat in a corner,
Eating a Christmas pie:
He put in his thumb,
And pulled out a plumb,
And cried, "What a good boy am I!"

GAMMER GURTON.

FESTO QUID POTIUS DIE.

Horner Jacculo sedit in angulo,
Vorans, cen serias ageret ferias,
Crustum dulce et amabile:
Inquit et unum extrahens prunum;
"Horner, quam fueris nobile pueris
Examplar imitabile!"—H. D. pp. 104, 105.

The following is of a different character:

LAW AND EQUITY.

Law and Equity are two things which God has joined, but which man has put asunder.—COLTON.

JUS INJURIA.

Justitiam Numen junxit cum Lege; sed eheu!
Quas junxit Numen, dissociavit Homo.

B. H. K. pp. 274, 275.

There is a beautiful Latin version of Tennyson's "May Queen." Shakspeare's "All the World's a Stage," is translated into Latin hexameters. The last part of the volume consists mainly of religious poems and prayers, all translated with exquisite beauty. We commend this collection of the Gayeties and Gravities of English scholarship to the attention of our readers.

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Judge.
		1862.	Returned by
Adams, William A.	Waltham,	June 25,	William A. Richardson.
Ames, Philander	Stoneham,	" 30.	William A. Richardson.
Bodwell, Robinson H.	Methuen,	" 19,	George F. Choate.
Boyd, John M.	Marlboro,	" 14,	William A. Richardson.
Brown, Jonathan, Jr.	Marblehead,	(No warrant.)	George F Choate.
Congdon, Samuel B.	Worcester,	June 19,	Henry Chapin.
Converse, William B.	Monson,	" 12,	John Wells.
Cox, Henry S.	Lynn.	" 21,	George F. Choate.
Davis, George T. (1)	Roxbury,	" 23,	William A. Richardson.
Doherty, Franklin, *alias* Frank	Georgetown,	" 20,	George F. Choate.
Doherty, Frank	Georgetown,	" 23,	George F. Choate.
Fisher, Cyrus	Lowell,	" 14,	William A. Richardson.
Gaffrey, Daniel	Gloucester,	" 14,	George F. Choate.
Gay, William	Holliston,	" 23,	William A. Richardson.
Richborn, George R.	Boston,	" 9,	Isaac Ames.
Hobbs, Curtis	Cambridge,	" 10,	William A. Richardson.
Johnson, Abijah S.	Newton,	" 11,	William A. Richardson.
Jones, William S.	Lunenburg,	" 10,	Henry Chapin.
Kimball, Charles M. [a]	Newton,	" 6,	William A Richardson.
Lowe, Henry T.	Rockport,	" 14,	George F. Choate.
Mansfield, George	Lowell,	" 3,	William A. Richardson.
Mathews, Henry	Worcester,	" 12,	Henry Chapin.
Moore, Uriah	Sudbury,	" 2,	William A. Richardson.
Morcomb, Fred. T.	Malden,	" 14,	William A. Richardson.
Oliphant, James W.	Newton,	" 23,	William A. Richardson.
Osgood, William	Boston,	" 16,	Isaac Ames
Rice, John W.	Sudbury,	" 12,	William A. Richardson.
Richardson, Henry M.	Boston,	" 9,	Isaac Ames.
Richardson, Robert M.	Lynn,	" 7.	George F. Choate.
Scates, Dodarah (?)	Brighton,	" 10,	William A Richardson.
Seymour, Charles W.	Marblehead,	" 21,	George F. Choate.
Spring, Charles C.	Worcester,	" 13,	Henry Chapin.
Stetson, David B.	Quincy,	" 16,	George White.
Tarr, Charles, 3d	Rockport,	" 14,	George F. Choate.
Thurston, William H.	Rockport,	" 27,	George F. Choate.
Trask, Elbridge	Danvers,	" 21,	George F. Choate.
Tufts, Edward, 2d	Malden,	" 14,	William A. Richardson.
Vinton, George A.	Southbridge,	" 19,	Henry Chapin.
Wright, Samuel T. (1)	Chelmsford,	" 25,	William A. Richardson.
Wild, George W. (2)	Danvers,	" 2,	William A. Richardson.
Wild, Henry M. (2)	Medford,	" 2,	William A. Richardson.

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[a] Dismissed.